Supreme Court, U.S.
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In the
Supreme Court of the United States
October Term, 1998

In the Matter of Louis Kerlinsky
Petitioner

Petition for a Writ of Certiorari
to the Supreme Judicial Court of the
Commonwealth of Massachusetts

-

Appendices To
Petition for Writ of Certiorari

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IN THE MATTER OF LOUIS KERLINSKY

Suffolk, November 5, 1998 - January 14, 1999.

PRESENT: WILKINS, C.J., GREANEY, FRIED, MARSHALL & IRELAND, JJ.

*Attorney at Law*, Disciplinary proceeding, Suspension. *Board of Bar Overseers.*

Evidence at a hearing on bar discipline was sufficient for the Board of Bar Overseers properly to conclude that the respondent attorney had violated several provisions of Canons 1, 6, and 7, S.J.C. Rule 3:07, as appearing in 382 Mass. 768 (1981). [662]

An appeal panel of the Board of Bar Overseers was authorized under S.J.C. Rule 4:01, § 8 (3), as appearing in 381 Mass. 784 (1980), to reverse the hearing committee's finding that an attorney had not violated Canon 1, S.J.C. Rule 3:07, as appearing in 382 Mass. 769 (1981); and the hearing committee's initial and supplemental findings supported the appeal panel's conclusion. [662-664]

Three years' suspension from the practice of law was the appropriate discipline for an attorney who, after having been publicly censured previously, engaged in a persistent and extended pattern of improper and unethical behavior that included neglecting a client's case, prosecuting a frivolous claim, and filing false and misleading affidavits and interrogatory answers. [664-666]

INFORMATION filed in the Supreme Judicial Court for the county of Suffolk on September 2, 1997.

The case was heard by *Lynch, J.*

*Louis Kerlinsky*, pro se

*Nancy E. Kaufman*, Assistant Bar Counsel.

APPENDIX A

MARSHALL, J. This bar discipline case concerns the conduct of Louis Kerlinsky (respondent) in representing Diane Kourouvacilis in a damage suit against General Motors Corporation (GM) and Avis Rent-A-Car (Avis) following an automobile fire. The respondent makes numerous challenges to the two-year suspension recommended by the Board of Bar Overseers (board) and imposed by the single justice. We limit our discussion to his claims regarding the sufficiency of the evidence on which the board concluded he had violated several provisions of the Canons of Ethics, the authority of the appeal panel of the board to amend the decision of the hearing committee, and the appropriate discipline to impose.

Bar counsel filed a petition for discipline against the respondent on May 23, 1994, alleging violations of S.J.C. Rule 3:07, Canon DR 1-102 (A) (4), (5), and (6), as appearing in 382 Mass. 769 (1981); Canon 6, DR 6-101 (A) (3), as appearing in 382 Mass. 783 (1981); Canon 7, DR 7-101 (A) (1), (2), and (3), as appearing in 382 Mass. 784 (1981); and DR 7-102 (A) (2), (5), and (7), and (B) (1), as appearing in 382 Mass. 785 (1981).[1] Between October, 1994, and March, 1995, a hearing

[1]New Massachusetts Rules of Professional Conduct became effective on January 1, 1998, replacing the former Canons of Ethics and Disciplinary Rules. S.J.C. Rule 3:07, as appearing in 4426 Mass. 1303 (1998) (Massachusetts Rules of Professional Conduct). The relevant parts of the former Canons and Disciplinary Rules in effect at the time of the respondent's challenged conduct state:

"DR 1-102. Misconduct.

"(A) A lawyer shall not: . . .

"(4) Engage in conduct involving dishonesty, fraud,deceit, or misrepresentation.

"(5) Engage in conduct that is prejudicial to the administration of justice.

committee of the board conducted six days of hearings at which two witnesses testified and 167 exhibits were introduced in evidence. Bar counsel recommended a three-year suspension. On December 11, 1995, the hearing committee issued its report recommending a one-year suspension with readmission "only upon application and the satisfactory completion of an ethics examination." The hearing committee concluded that the respondent had violated DR 6-101 (A) (3), DR 7-101 (A) (1), (2), and (3), DR 7-102 (A) (2) and (7), and DR 7-102 (B) (1), and that the respondent had not violated any of the provisions of Canon 1. Both parties took an appeal from the hearing

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"(6) Engage in any other conduct that adversely reflects on his fitness to practice law."

"DR 6-101. Failing to Act Competently.

"(A) A lawyer shall not: . . .

"(3) Neglect a legal matter entrusted to him."

"DR 7-101. Representing a Client Zealously.

"(A) A lawyer shall not intentionally:

"(1) Fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules, except as provided by DR 7-101 (B). A lawyer does not violate this Disciplinary Rules, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.

"(2) Fail to carry out a contract of employment entered into with a client for professional services, but he may withdraw as permitted under DR-110, DR 5-102, and DR 5-105.

committee's report.

On July 30, 1996, an appeal panel of the board remanded the case to the hearing committee for clarification of its findings and rulings. The appeal panel sought information regarding whether the respondent's violation of DR 7-101 (A) (1), (2), and (3) was intentional, whether his violation of DR 7-102 (A) (2) and (7) was done knowingly, and whether the respondent had knowingly violated DR 7-102 (A) (5).[2] The hearing committee issued supplemental findings and a report on August 19, 1996, finding

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"(3) Prejudice or damage his client during the course of the professional relationship, except as required under DR 7-102 (B)."

"DR 7-102. Representing a Client Within the Bounds of the Law.

"(A) In his representation of a client, a lawyer shall not: . . .

"(2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law. . . .

"(5) Knowingly make a false statement of law or fact. . .

"(7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent."

"(B) A lawyer who receives information clearly establishing that:

"(1) His client has, in the course of representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication."

that the respondent's conduct, and therefore his violation of DR 7-101 (A) (1), (2), and (3), was intentional, that he knowingly violated DR 7-102 (A) (2), and that he had not violated DR 7-102 (A) (5). The committee also noted that the respondent had knowingly violated DR 7-102 (A) (7). On May 29, 1997, the appeal panel issued its report, adopting the initial and supplemental findings of the hearing committee and upholding the hearing committee's rulings that the respondent had violated Canons 6 and 7. The appeal panel disagreed with the hearing committee's dismissal of the alleged violations of Canon 1, and ruled that the respondent had violated DR 1-102 (A) (4), (5), and (6). The appeal panel recommended a two-year suspension, and suggested that "the respondent complete continuing legal education courses in ethics, and pass the MPRE between the date of suspension and any petition for reinstatement."

On July 14, 1997, the board voted unanimously to adopt the appeal panel report and recommended discipline. The board filed an information in the county court on September 2, 1997, and a single justice of this court suspended the respondent for two years on December 3, 1997, from which the respondent appeals. We vacate the decision of the single justice and order that the respondent be suspended for a period of three years.

1. We summarize the extensive facts found by the hearing committee and upheld by the appeal panel. Some details of other cases related to the one giving rise to the discipline sought here illuminate the challenged conduct of the respondent.

The respondent was admitted to the bar of the Commonwealth in 1952, and has represented Kourouvacilis in a number of matters, including a 1981 divorce; a personal injury and property damage suit arising from an automobile accident in 1983; a wrongful discharge case filed in December, 1987; and the automobile fire suit against GM and Avis at issue here, filed in October, 1988. In July, 1983, Kourouvacilis was involved in an automobile accident while driving a Chevrolet automobile that she had purchased from Avis in 1979.[3] The respondent agreed to represent Kourouvacilis on a contingent fee basis in a suit against

[2]The hearing committee had made no ruling on the alleged violation of DR 7-102 (A)(5).

the other driver, and, in June, 1984, filed suit on behalf of his client. The complaint alleged that the automobile had been seriously damaged in the 1983 accident, that is was unsafe to drive, and that as a result of the accident Kourouvacilis was being treated for migraine headaches by Dr. Lawrence Metz. The respondent later settled that case by negotiating payments of the policy limits from the insurers of both Kourouvacilis and the other driver.

In August, 1984, Kourouvacilis was discharged from employment at Monson State Hospital (Monson) for excessive absenteeism. In November, 1987, the respondent agreed to represent Kourouvacilis, again on a contingent fee basis, in a wrongful termination suit against the Commonwealth and Monson (Monson suit).[4] In December, 1987, he filed a suit on her behalf that was still pending at the time of respondent's hearing in this disciplinary matter.

In or about November, 1985, the Chevrolet automobile that Kourouvacilis purchased from Avis caught fire while she was operating it; the car was destroyed. The respondent agreed to represent Kourouvacilis on a contingent fee basis in the suit against GM and Avis. The respondent failed to adequately investigate the cause of the automobile fire,[5] and failed to have the automobile inspected by an expert before Kourouvacilis's insurer sold it for salvage. Nonetheless, the suit against GM and Avis raised warranty, negligence, deceit, fraud, and G.L. c.93A claims, specifically alleging that the fire was caused by "defective wiring."[6]

Neither did the respondent investigate his client's claims of personal injury. When he first agreed to represent her, Kourouvacilis made no claims of physical injury, or that she had sought medical treatment as a result of the fire. The fire department official's report similarly stated that Kourouvacilis

[3]The Chevrolet automobile had over 17,000 miles on the odometer when Kourouvacilis purchased it.

[4]This suit also alleged a claim against the American Federation of State, County, and Municipal Employees (AFSCME), Kourouvacilis's union, alleging a violation of its duty to her of fair representation.

[5]Between November, 1985, and April, 1988, the

had suffered no injuries.[7] The respondent attempted to document Kourouvacilis's alleged injuries through Dr. Metz, alleging that Dr. Metz treated her for migraine headaches resulting from "smoke inhalation." Dr. Metz' records, however, indicated that Kourouvacilis last visited his office in February, 1985, nine months before the fire. Kourouvacilis testified during depositions that Dr. Metz had treated her for migraines after the fire; the respondent did not counsel her to correct her misstatements, even after she was unable to produce documentation of any postfire treatment.

The respondent also drafted a statement for Walter Grzebian, a front-end mechanic, stating that, based on his experience and training, the fire was caused by defective wiring installed by GM.[8] In a telephone conversation, Grzebian told the respondent that it was "ridiculous" that he had been subpoenaed to give deposition testimony because he did not "know anything [about] the [Chevrolet] or what could cause the fire."

In interrogatories and an affidavit prepared by the respondent, he falsely represented that expert witnesses were available to testify in support of Kourouvacilis's claims. He prepared interrogatory answers identifying "Matheson," "Grez," "Lt. Colburn, Fire Marshall [*sic*]," and Dr. Metz as expert witnesses, despite the fact that he had neither consulted nor retained any of them as expert witnesses, and knew that none

respondent's investigation consisted of two letters to GM seeking a settlement and demand letters to GM and Avis pursuant to G.L. c.93A. Two and one-half years after agreeing to represent Kourouvacilis in this matter, the respondent wrote to the fire department official responsible for investigating the fire, and received his report in May, 1988. In June, 1988, the fire official left a message for the respondent, stating that he did not remember anything about the fire. The respondent never returned the telephone call, and never spoke directly to the fire official.

[6]The respondent also failed to investigate whether, as Kourouvacilis had told him, the Chevrolet was new at the time she purchased it from Avis. Kourouvacilis also stated that the automobile required only maintenance, in direct contradiction to the allegations of the automobile's unfitness after the 1983 accident.

would testify in support of any of client's claims. In support of his opposition to the defendants' motion for summary judgment, the respondent prepared an affidavit on October 6, 1989, signed by Kourouvacilis, which stated that she had been treated by Dr. Metz after the fire in "October, 1985," and that she had bills that she had received from Dr. Metz for treatment in 1986. He also attempted to file an unsworn statement of "—Grez" that he prepared, offering Grzebian's "expert opinion." A judge in the Superior Court allowed the defendants' motion for summary judgment. On appeal we affirmed the entry of summary judgment. *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706 (1991).

The respondent also advanced misstatements about Kourouvacilis's employment and alleged wages lost as a result of

[7]The respondent requested a report from Kourouvacilis's counselor at Springfield Technical Community College, Carol Mathison, on the effects of the fire on Kourouvacilis's physical condition. Mathison stated that she only had an "impression" of the effect of the fire on Kourouvacilis, and that Kourouvacilis had a short attention span and poor memory. In her August, 1989, deposition, Mathison stated that Kourouvacilis had reported no physical injury from the fire, and that Mathison "could not provide the nexus between the 1985 fire and Kourouvacilis's emotional and academic problems because she was not qualified to identify the cause of the post-traumatic stress disorder she observed in Kourouvacilis." She was not retained as an expert.

[8]The respondent had requested that Kourouvacilis obtain statements from "auto mechanics regarding the cause of [her] fire." She left a message for the respondent, stating that her mechanic, "Grez," was a front-end and suspension specialist who did not do wiring or electrical repairs but would be willing to help. Kourouvacilis drafted a statement for Grzebian, stating that he did not perform wiring or electrical repairs, but that he had been advised by Kourouvacilis that the fire marshal believed the fire had been caused by defective wiring. The respondent redrafted this statement without speaking to Grzebian, removed the qualification about his experience, and substituted the language discussed above. Grzebian signed the statement and

the fire. In answers to GM interrogatories, he advanced his client's claim that she lost two weeks of wages and her position at "Adral Co." In answers to Avis's interrogatories, he advanced her claim that she had not been employed for two years after the fire because of resulting emotional problems, and that her lost earning capacity totaled $36,000. These statements were not only consistent as between GM and Avis, but they contradicted and jeopardized the theory of Kourouvacilis's Monson suit. In that case, Kourouvacilis claimed that she was ready and able to work after her 1984 termination, but had been unable to find work until June, 1986. The respondent advanced these misstatements of his client, and did not counsel her to correct either the misstatements or the inconsistencies.

2. *Sufficiency of the evidence.* The respondent makes numerous challenges regarding the sufficiency of the evidence on which the board concluded that he had violated the several provisions of Canons 1, 6, and 7. Among other challenges, he claims that he did not neglect any legal matter entrusted to him, that he did not fail to represent his client zealously, that he did not advance a claim that was unwarranted under existing law, that his client did not clearly perpetrate a fraud that he was thereby required to reveal, and that he did not counsel or assist his client in conduct that he knew to be illegal or fraudulent. We have reviewed the entire record and are satisfied that there was more than adequate evidence to support each of the violations. We see no reason to provide a point-by-point rebuttal to the respondent's arguments.

3. *Authority of the panel.* The respondent challenges the authority of the appeal panel to reverse the hearing committee's finding that he did not violate DR 1-102 (A) (4), (5), and (6). The appeal panel erred, he claims, because these violations require a determination of intent, a matter within the province of the hearing committee as the "sole judge of the credibility of the testimony presented at the hearing." *Matter of Saab*, 406 Mass. 315, 328 (1989). Supreme Judicial Court Rule 4:01, § 8(3), as appearing in 381 Mass. 784 (1980), states:

> "The Board may adopt the findings of fact submitted by the hearing committee or the panel or revise such findings

returned it to the respondent on April 13, 1989.

which it determines to be erroneous, paying due respect to the role of the hearing committee or the panel as the sole judge of the credibility of the testimony presented at the hearing."[9]

The appeal noted specifically that it was authorized to make the revision "since it does not involve the determination of the credibility of any witness's testimony." We are satisfied that the appeal panel's amendment of the hearing committee's report was proper, and involved no credibility determination. Rather, in our assessment, the appeal panel rightfully corrected errors it concluded the hearing committee had made in applying its findings to the disciplinary rules at hand. The appeal panel concluded that the respondent:

> "(1) prepared and served opposing counsel with discovery material and pleadings based on false statements of fact the respondent knew to be false; (2) fraudulently procured affidavits; (3) permitted deposition testimony to stand uncorrected when he knew it contained false statements; and (4) engaged in conduct that delayed litigation, complicated discovery, and wasted the time and resources of the courts."

The hearing committee's initial and supplemental findings contained more than adequate support for the conclusion that this behavior constituted "fraudulent, dishonest conduct which was prejudicial to the administration of justice, and reflected adversely upon the respondent's fitness to practice in violation of DR 1-102 (A) (4), (5), and (6)."[10]

4. *Appropriate discipline.* The respondent argues that a two-year suspension of his license is a miscarriage of justice and

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[9]We amended this rule, effective July 1, 1997. The substance of the rule is now contained in S.J.C. Rule 4:01, § 8 (4), as appearing in 425 Mass. 1309 (1977), and states in part:.

> "The Board shall review, and may revise, the findings of fact, conclusions of law and recommendation of the hearing committee . . . judge of the credibility of the testimony present at the hearing."

grossly disparate." We disagree. In bar discipline cases, we "inquire whether the judgement is markedly disparate from those ordinarily entered by the various single justices in similar cases." *Matter of Clooney*, 403 Mass. 654, 658 (1988), quoting *Matter of Alter*, 389 Mass. 153, 156 (1983). The "primary factor" in bar discipline is "the effect upon, and perception of, the public and the bar." *Matter of Finnerty*, 418 Mass. 821, 829 (1994), quoting *Matter of Alter, supra*.

The facts of this case establish that the respondent engaged in a " 'persistent and extended pattern of improper and unethical behavior' of the sort that would justify a suspension." *Matter of Saab, supra* at 825, quoting *Matter of McInerney*, 389 Mass. 528, 5331 (1983). The respondent neglected his client's case. He prosecuted a frivolous claim, needlessly consuming the resources of the judicial system for several years. He filed false and misleading affidavits and interrogatory answers.

The appeal panel concluded that a two-year period of suspension from the practice of law was appropriate. It did so reasoning "[t]he existence of prior discipline, unlike the absence of prior discipline, is a 'substantial factor in selecting the level of discipline.' " *Matter of Dawkins*, 412 Mass. 90, 96 (1992), quoting *Matter of Bryan*, 411 Mass. 288, 291 (1991). "We consistently have considered a record of past misconduct, even if unrelated to the current charges, in determining the appropriate sanction." *Matter of Dawkins, supra*, and cases cited. The existence, as well as the timing, of the respondent's prior disciplinary record persuades us that a suspension longer than that imposed by the single justice is appropriate.

[10]The respondent also argues that S.J.C. Rule 4:01, § 8 (3), as appearing in 381 Mass. 784 (1980), is unconstitutional because it allows an attorney to be punished on proof by a preponderance of the evidence as opposed to "clear and convincing evidence." [B]ar discipline charges need only be proven by a preponderance of the evidence." *Matter of Budnitz*, 425 Mass. 1018, 1018 n.1 (1997), citing *Matter of Mayberry*, 295 Mass. 155, 167 (1936), and the respondent's constitutional claim is without merit.

The respondent was publicly censured in 1989 for charging a fee in excess of the fee set out in the contingent fee agreement. He refused to turn over the portion of the recovery to which the client was entitled, and withheld funds from the client to pay another attorney without his client's consent. *Matter of Kerlinsky*, 406 Mass. 67 (1989). That the respondent continued to engage in the unethical behavior at issue in this case during the pendency of and subsequent to his earlier disciplinary proceedings warrants more severe discipline.[11] His earlier public censure obviously was not sufficient to dissuade him from engaging in further unethical behavior.

In *Matter of Tobin*, 417 Mass. 81 (1994), we last surveyed cases in which three-year suspensions were imposed. In that case, we reduced a three-year suspension imposed by a single justice to eighteen months.[12] *Id.* at 91. We noted that "[t]hose attorneys who had not been convicted of crime yet received three-year suspensions demonstrated a pattern of neglect and deceit or misused substantial sums of clients' funds." *Id.* At 89 n.8. We are satisfied that the respondent's conduct in this case rises to the level of a "pattern of neglect" warranting a three-year suspension. *Id.* Since *Tobin*, a single justice has imposed a three-year suspension in *Matter of Dittami*, 12 Mass. Att'y Discipline Rep. 98 (1996), which we view as analogous to the present case. In that case, the attorney engaged in conflicts of interest while mediating a business dispute and made written misrepresentations while defending himself in a civil action. *Id.* at 101. The respondent in that case, as in this case, previously had received a public censure. *Id.* at 1113. Although the board in that case, as it did here, recommended a two-year suspension, the single justice increased the suspension to three years. *Id.* at 98, 101. While we note that many of the cases in which three-year suspensions have been imposed involve criminal convictions, we reiterate our observation in *Tobin* that such a suspension may be appropriate where, as here, the respondent has engaged in behavior that demonstrates a "pattern of neglect or deceit." *Matter of Tobin, supra*.

[11]Bar counsel commenced the initial disciplinary proceedings against the respondent on September 26, 1986, which resulted in the public censure affirmed by *Matter of Kerlinsky*, 406 Mass. 67

We are persuaded that an increase in the period of suspension is appropriate based on the number of violations the respondent committed both her and in his earlier disciplinary case. "The simultaneous consideration of separate violations . . . is an established part of the disciplinary system of this Commonwealth." *Matter of Saab*, *supra* at 326. The Board found that the respondent violated ten separate disciplinary rules in this case and six in the earlier case. *Matter of Kerlinsky*, *supra* at 71-72. The cumulative effect of these violations further supports our conclusion that an additional period of suspension is appropriate. The board concluded, accurately in our view, that the "respondent lacks any appreciation that his behavior was improper and violated the Canons of Ethics." "[I]mposing any sanction less severe . . . would 'undermine[] the clear standards of [*Matter of the Discipline of an Attorney*, 392 Mass. 827 (1984)], and, in the process . . . diminish[] the court's credibility in an area where the public interest requires steadfast protection of clients' rights.' " *Matter of Dawkins*, *supra* at 97, quoting *Matter of Driscoll*, 695, 705 (1991) (Greaney, J., dissenting).

The decision of the single justice is vacated and a judgment is to be entered in the Supreme Judicial Court for the county of Suffolk ordering that the respondent be suspended from the practice of law for a three-year period.

*So ordered.*

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(1989).

[12]The respondent in *Tobin* had, among other violations, "intentionally and fraudulently induced the complainant to retain him for unnecessary probate services." *Matter of Tobin*, 417 Mass. 81, 91 (1994).

# COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH

AT BOSTON, JANUARY 14, 1999

IN THE CASE NO. SJC-07626

IN THE MATTER OF LOUIS KERLINSKY

pending in the Supreme Judicial Court
for the County of Suffolk NO. BD-97-050

ORDERED, that the following entry be made in the docket; viz.,--

The decision of the single justice is vacated and a judgment is to be entered in the Supreme Judicial Court for the county of Suffolk ordering that the respondent be suspended from the practice of law for a three-year period.

BY THE COURT,

_____, CLERK.

SEE OPINION ON FILE.

APPENDIX A - supplement

**Memorandum of Decision**

The respondent is suspended from the practice of law of two years from this date hereby for the reasons stated in the report of the appeal panel.

In making my decision I have taken notice of the opinion of the Supreme Judicial Court in *Kourouvacilis v. General Motors*, 410 Mass. 706 (1991).

Neil L. Lynch
December 3, 1997 *Associate Justice*

**Report of Appeal Panel**

This matter came before a Panel of the Board of Bar Overseers on appeal of the respondent and cross-appeal of Bar Counsel. On May 23, 1994, Bar Counsel filed a Petition for Discipline alleging violations of: Canon One, Disciplinary Rules 1-102(A)(4), (5) & (6); Canon Six, Disciplinary Rule 6101(A)(3); and Canon Seven, Disciplinary Rules 7-101(A)(1), (2), & (3); Disciplinary Rules 7-102(A)(2), (5), (7) and 7-102(B)(1). On December 11, 1995, the Hearing Committee submitted a report finding violations of: DR 6-101(A)(3); DR 7-101(A)(1),(2), & (3); DR 7-102(A)(7); and DR 7-102(B)(1). The Committee did not find violations of: DR 1-102(A)(4), (5), and (6); and DR 7102(A)(5). The Committee recommended a suspension from the practice of law for one year, with readmittance only after application and the completion of an ethics examination.

On appeal, respondent objects to the Committee's findings of fact and requests a dismissal of the charges. On cross-appeal, Bar Counsel seeks a finding of a violation of Canon One and a three-year suspension from the practice of law. Briefs were filed by both parties to the appeal and cross-appeal.

On June 10, 1996, oral argument was heard by Daniel C. Crane, Esq. (Chair), Naomi Gordon, and Richard P. Melick, Esq.,

an Appeal Panel of the Board of Bar Overseers. On July 30, 1996, the appeal panel remanded the matter to the Hearing Committee for clarification of its findings and rulings. On August 19, 1996, the Hearing Committee provided such clarification in supplemental findings. The appeal panel now upholds the initial findings as well as the supplemental findings of the Hearing Committee, and finds they are supported by the evidence. The appeal panel further upholds the rulings of the Hearing Committee with respect to the violations of Canon Six and Canon Seven. However, based upon the findings and the law, the appeal panel declines to follow the Hearing Committee's dismissal of the alleged violations of Canon One and rules that the respondent engaged in dishonest and fraudulent conduct which was prejudicial to the administration of justice in violation of Canon One, Disciplinary Rule 1-102(A)(4), (5), and (6).

For the reasons discussed below, the appeal panel recommends discipline of two years' suspension from the practice of law and strongly suggests the respondent complete continuing legal education courses in ethics, and pass the MPRE between the date of the suspension and any petition for reinstatement.

## Factual Background

The appeal panel rules that the evidence supports the findings of the hearing committee which are summarized and set forth in part below.

The respondent represented Ms. Diane Kourouvacilis ("Kourouvacilis") in a number of matters including: a 1981 divorce; a 1983 car accident ("1983 accident") involving her 1979 Chevrolet Monte Carlo ("Monte Carlo"); a claim alleging wrongful termination against her employer filed on December 1, 1987; and a suit filed on October 27, 1988 arising from the destruction of the Monte Carlo in a 1985 fire ("1985 fire").

On or about August 6, 1984, Kourouvacilis was discharged from her employment at Monson State Hospital for excessive

absenteeism. On or about November 24, 1987, respondent agreed to represent Kourouvacilis in a wrongful termination suit against Monson State Hospital and against AFSCME, Kourouvacilis' union ("Monson Case").

On November 1, 1985, Kourouvacilis' Monte Carlo was destroyed by a fire during its operation. On November 20, 1985, respondent again agreed to represent Kourouvacilis in a claim for damages from this fire against the manufacturer of the Monte Carlo, General Motors Corporation ("GM"), and Avis-Rent-A-Car ("Avis"). She purchased the Monte Carlo from Avis, in Connecticut, with over 17,000 miles on the odometer in 1979. At the time of the fire, the odometer had over 73,000 miles on it. Furthermore, this car had been seriously damaged two years earlier in the 1983 accident. After the 1983 accident, respondent alleged the car was unsafe to drive and that Kourouvacilis was under the treatment of Dr. Metz for migraine headaches caused by this accident.

Respondent failed to adequately investigate the cause and origin of the 1985 fire. Respondent failed to immediately determine which fire department investigated the 1985 fire. Likewise, he failed to identify the salvage yard where the Monte Carlo had been brought. Even after receiving a report from Kourouvacilis' insurer that the cause of the 1985 fire could not be determined, respondent did not attempt to inspect the car or have it inspected by an expert. As a result, Kourouvacilis' insurer sold the car for salvage two months later, before an examination of the Monte Carlo, expert or otherwise, occurred.

Between November, 1985 and April, 1988, respondent's investigation of the claims surrounding the 1985 fire amounted to two letter to GM seeking a settlement and a c.93A demand letter sent to GM and Avis.

Two years and six months after agreeing to take the case, respondent contacted Lt. Colburn, the fire department official who investigated the 1985 fire. He received a copy of Lt. Colburn's report, on May 21, 1988. On June 15, 1988, Lt.

Colburn indicated that he did not remember anything about the fire. Lt. Colburn left this message for respondent, along with his phone number. Respondent did not return the call and never spoke to Lt. Colburn.

Respondent also failed to investigate whether or not the Monte Carlo was bought new, even though it was important to pursuing his client's claim on the theory of res ipsa loquitur that the car was new and in the same condition at the time of the 1985 fire as when it left the factory. Kourouvacilis told respondent she had purchased the Monte Carlo "brand new" from Avis and that it had required only regular maintenance. Respondent knew Avis was a rental car agency, and probably did not sell new cars. Moreover, respondent knew the Monte Carlo had required repairs after the 1983 accident, because he had alleged in the 1983 accident that the car was unsafe to drive.

Lacking the opinion of an expert regarding the cause and origin of the fire and without evidence upon which an expert could base an opinion, respondent filed a complaint against GM and Avis raising warranty, negligence, deceit, fraud and c. 93A claims on October 27, 1988. The only investigation respondent had done revealed the source of the fire was unknown (through U.S.F.&G, Kourouvacilis' auto insurer) and the fire could not be remembered (through Lt. Colburn). Nevertheless, the complaint specifically alleged the 1985 fire had been caused by a manufacturing or design defect, present when the vehicle was sold, and that the 1985 fire had been caused by "defective wiring."

Respondent also failed to adequately investigate Kourouvacilis' allegations of personal injury. When the respondent first agreed to represent Kourouvacilis in November, 1985, regarding claims arising from the 1985 fire, she did not represent to him that she had been injured, sought medical treatment, or incurred any medical bills as a result of this fire. As a result, respondent did not file a PIP claim on her behalf. The report filed by Lt. Colburn, which respondent did eventually

obtain, stated there were no personal injuries. Nonetheless, respondent wrote to Carol Mathison, Kourouvacilis' counselor at Springfield Technical Community College, requesting a report regarding the effects of the 1985 fire on Kourouvacilis' physical condition. On June 28, 1988 Ms. Mathison's report similarly did not document any physical injuries. It only stated an "impression" of the effect the 1985 fire had on Kourouvacilis. The letter reported Kourouvacilis had a short attention span and poor memory. The respondent never discussed the contents of this letter with Ms. Mathison.

Respondent also attempted to verify Kourouvacilis' injuries through Dr. Metz, alleging Dr. Metz treated Kourouvacilis for migraine headaches caused from "smoke inhalation." However, Dr. Metz's records indicated Kourouvacilis last saw Dr. Metz nine months before the 1985 accident. Nevertheless, Kourouvacilis testified during depositions that she had been treated by Dr. Metz for smoke inhalation after the 1985 fire. As of May 19, 1989, respondent knew that the medical records established Kourouvacilis had last been treated by the doctor prior to the 1985 fire. In fact, on September 18, 1989, in correspondence to Kourouvacilis, respondent stated it was "not helpful to have misinformation in your interrogatory answers and your sworn deposition" and demanded that she produce any documentation that she saw Dr. Metz "at any time after October, 1985." Respondent never called upon his client to correct these misstatements even after Kourouvacilis was not able to produce such documentation.

In answers to interrogatories and an affidavit prepared by respondent, it was falsely represented there were expert witnesses available to testify in support of Kourouvacilis' claims. Respondent requested that Kourouvacilis obtain a statement from "auto mechanics regarding the cause of [her] fire." Kourouvacilis left the message with respondent that her mechanic, whom she referred to as "Grez," was a front-end and suspension specialist and did not do wiring or electrical repairs but would be willing to

help. Kourouvacilis drafted a statement for "Grez" which stated he did not do wiring or electrical repairs but had been advised by Kourouvacilis that the fire marshal thought the 1985 fire had been due to defective wiring. Respondent took this draft without talking to the mechanic, whose real name is Walter Grzebien ("Grzebien"), drafted a second statement which omitted the disclaimer of experience with electrical repairs and substituted, "[b]ased on my experience and training," and attributed the cause of the 1985 fire to "defective wiring" installed by GM. Grzebien signed the statement and returned it to the respondent on April 13, 1989.

During an August, 1989 phone conversation with respondent, Grzebien complained that it was "ridiculous" he had been subpoenaed to testify at a deposition because he did not "know anything [about] the Monte Carlo or what could cause the fire." At this time, respondent did not question Grzebien about his testimony, training or experience in automotive electrical systems.

Aside from respondent's initial correspondence with Carol Mathison, during an August, 1989 deposition, she testified Kourouvacilis had not reported any injury from the 1985 fire. Ms. Mathison also stated she could not provide the nexus between the 1985 fire and Kourouvacilis' emotional and academic problems because she was not qualified to identify the cause of the posttraumatic stress disorder she observed in Kourouvacilis. She further testified she had not been retained as an expert in the case.

Despite knowledge to the contrary, respondent prepared and filed interrogatory answers falsely identifying Carol "Matheson," Walter "Grez," "Lt. Colburn, Fire Marshall," and Dr. Metz as expert witnesses. Respondent knew he had not consulted or retained any of these persons as experts, he had never received an expert opinion from these persons, and that none of the listed witnesses would testify in any way to support his client's claim, on any theory.

Respondent insisted on advancing this misinformation in his opposition to summary judgment. On October 6, 1989, respondent prepared an affidavit signed by Kourouvacilis, under the penalties of perjury, falsely representing she had been treated by Dr. Metz after the fire in "October, 1985" and had bills from him for treatment in 1986. Respondent further opposed the summary judgment motion by attempting to file an unsworn statement of "—Grez," prepared by respondent which again offered Grzebien's "expert" opinion.

Despite a lack of expert opinion on the cause and origin of the 1985 fire or on the cause of Kourouvacilis' injuries, respondent pursued the case against GM and Avis even after the trial court granted summary judgment. The respondent appealed the trial court's ruling based on the record. The appeal was transferred to the Supreme Judicial Court on its own motion. The trial court's decision was upheld in *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706 (1991).

Respondent did not only advance misstatement of his client on the subjects of the cause of the fire and her alleged injuries. He also advanced misstatements regarding her employment and alleged lost earnings due to the 1985 fire. In response to GM interrogatories, respondent advanced Kourouvacilis' claim that she lost two weeks' worth of wages in 1985 and her job at "Adral Co." due to the 1985 fire. Despite these allegations, in answers to Avis interrogatories prepared and filed by respondent, Kourouvacilis claimed that she had not been employed for two years after the accident because of emotional problems caused by the fire, and she claimed $36,000 in lost earning capacity. Not only were these statements inconsistent within the case against GM and Avis but, they were inconsistent with, and jeopardized, the theory respondent was advancing on behalf of Kourouvacilis in the Monson case. In the Monson case respondent and Kourouvacilis consistently maintained she was ready and able to work after her discharge from Monson but was unable to find work until June, 1986. Respondent advanced Kourouvacilis'

misstatements and he failed to call upon his client to correct these misstatements and inconsistencies during her sworn deposition testimony.

**Discussion**

Respondent could have pursued a recovery for his client's claims arising from the 1985 fire in two ways. First, he could have proceeded on a theory of res ipsa loquitur. Alternatively, he could have provided expert witnesses to prove the cause and origin of the fire and to prove the existence of a design or manufacturing defect.[1] *See Kourouvacilis v. General Motors Corp.*, 410 Mass. 706 (1991). It was clear from the outset that Kourouvacilis' claims arising from the 1985 fire could not prevail on the theory of res ipsa loquitur. The car was purchased used by Kourouvacilis, had been in an accident in 1983, after which fire had over 73,000 miles on the odometer.[2]

Therefore, it was imperative to the success of the case that respondent engage an expert to identify the cause and origin of the fire and to prove that a design defect existed when it was last possessed by either GM or Avis. *See id.* at 708. Of course after this was satisfied, respondent would also have the burden of proving Kourouvacilis sustained damages as a result of this design defect. *See id.* at 712. Notwithstanding any novel theories of law respondent was attempting to advance, he violated the disciplinary rules by neglecting to properly investigate the facts of the case and compounded his neglect by knowingly misrepresenting the facts to attempt to withstand the defendants' motions for summary judgment.

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[1]Expert testimony is necessary to prove a design defect unless "a jury can find of their own lay knowledge that there exists a design defect which exposes users of a product to unreasonable risks of injury." *Smith v. Ariens Co.*, 375 Mass. 620, 625 (1978) (citing *Do Canto v. Ametek, Inc.*, 367 Mass.

**Disciplinary Rules 6-101(A)(3); 7-101(A)(1), (2), (3)**

The appeal panel upholds the Hearing Committee's ruling that respondent neglected his client's case that was entrusted to him and intentionally: (1) failed to seek the lawful objectives of his client; (2) failed to carry out a contract of employment on behalf of his client; and (3) prejudiced his client during the course of the professional relationship. Respondent neglected his client's case and failed to represent her zealously through: (1) the failure to preserve key evidence; (2) the failure to engage necessary expert witnesses; (3) the failure to speak with witnesses prior to drafting their statements; (4) the continued delegation of duties to a client who was clearly unable to adequately perform them; and (5) the failure to resolve discrepancies between the sworn deposition testimony of key witnesses and the information provided to him by his client, which jeopardized the client's claim in another pending case also being handled by respondent. This conduct constituted violations of DR 6-101(A)(3), and DR 7-101(A)(1)(2) & (3).

While some authorities have postulated that neglect is adequate to sustain a violation of DR 7-101(A), we need not address that issue here. *See* Tuoni, *Massachusetts Attorney Conduct Manual*, Volume 2, 7-11-7-16 (1992). The Hearing Committee found that the "foreseeable and direct result" of the

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776, 782 (1975).

[2]The Supreme Judicial Court noted, "There is no merit to the plaintiff's argument that, even without expert testimony, she can prove her case by invoking the doctrine of res ipsa loquitur. The common experience of mankind in no way suggests that an unexplained fire in an automobile six years after its purchase was caused by a defect in the vehicle that had existed from the time of the vehicle's manufacture or sale." (citations omitted) *Kourouvacilis*, 410 Mass. At 717.

intentional acts and omissions of the respondent was harm to his client. (Supplemental Findings at 2) The "purpose" of the respondent is irrelevant. He intentionally acted and failed to act in ways that harmed his client, in violation of DR 7-101(A).

Respondent failed to exercise a reasonable degree of skill and care in the investigation of Kourouvacilis' claims. He made no attempt to preserve the Monte Carlo. He knew one of two fire departments investigated the fire but never attempted to contact either. Likewise, he made not attempt to contact autobody shops where the Monte Carlo may have been located.

Even after receiving the insurance report on December 17, 1985, which indicated the cause of the fire could not be determined, the respondent did not attempt to locate the Monte Carlo or to have the car examined, not to mention engage an expert witness. Respondent knew the Monte Carlo had substantial mileage on the odometer and that it had been involved in a serious accident in 1983. In fact, he alleged on behalf of Kourouvacilis that the Monte Carlo was not safe to drive as a result of the 1983 accident. The car was sold for salvage on January 8, 1986. This eliminated any reasonable chance that the cause and origin of the fire could be established, seriously prejudicing his client's case.

Respondent did not just fail to investigate his client's claim and obtain expert witnesses. He attempted to compensate for his lack of expert testimony, necessary to prove his case, by fabricating the needed testimony from witnesses who were not qualified to so testify. Without speaking to him directly, respondent drafted a statement for Walter Grzebien, incorrectly referred to as "Grez," which provided an opinion that the cause of the 1985 fire was due to defective wiring. However, respondent omitted the key information related to him by Kourouvacilis, that Grzebien, a front-end and suspension specialist who did not perform wiring or electrical repairs, had no opinion on the cause and origin of the fire. Respondent knew of this limitation on Grzebien before he drafted the statement.

Nevertheless, respondent was relentless in presenting Grzebien as an expert in the cause of the 1985 fire. During their first conversation on August 7, 1989, Grzebien indicated he had no opinion as to the cause of the fire. Nevertheless, approximately three weeks later, respondent prepared answers to Avis interrogatories listing Grzebien as an expert as to the cause of the 1985 fire.

The failure to speak with a witness prior to drafting a statement was not an isolated occurrence. Respondent drafted a statement for Lt. Colburn's signature, without speaking to him, indicating the cause of the 1985 fire was due to defective wiring at the time the car was manufactured. Lt. Colburn never signed this statement. Respondent contacted Lt. Colburn seeking the fire report and a follow-up letter requesting clarification of the report. However, when Lt. Colburn left his phone number with the message that he did not remember the fire, respondent never bothered to pursue the matter.

The respondent delegated the primary responsibility of obtaining evidence regarding injuries as well as expert evidence regarding the cause of the 1985 fire to his client. This alone is not neglect; however, the respondent delegated this duty to a client who was not qualified to perform it. Respondent knew she had a "poor memory" and "short attention span." Respondent did not provide adequate guidance to the client regarding the information that was necessary to substantiate any claim.

Moreover, respondent received "clear and unequivocal evidence" that Kourouvacilis was not adequately performing this task. The "expert" Kourouvacilis obtained was a mechanic who was a front-end and suspension specialist who did not do wiring or electrical repairs. She claimed to have spoken with a "fire marshal" when the accident occurred. However, despite several requests, she did not obtain a statement from the fire marshal. Respondent's continued delegation of tasks to Kourouvacilis, despite the evidence she was not capable of adequately performing the tasks, "can only be categorized as neglect."

Respondent did not attempt to resolve discrepancies between statements made by Kourouvacilis and Dr. Metz. Kourouvacilis testified she had seen Dr. Metz "within a few days" of the November, 1985 fire and had been under his care for injuries suffered from the fire. On August 31, 1989, respondent prepared and served answers to Avis' interrogatories indicated that to the best of Kourouvacilis' knowledge she did not receive any medical bills regarding the fire. Approximately six weeks later, on October 6, 1989, the respondent prepared Kourouvacilis' affidavit stating she had bills from Dr. Metz for treatment after the 1985 fire. However, Dr. Metz's deposition, consistent with his records, indicated Kourouvacilis' last visits to Dr. Metz occurred nearly a year before her November, 1985 accident, on January 18, 1985 and February 8, 1985. Proof of injury was essential to the success of his client's case. Respondent did not call upon his client to correct the obvious inconsistencies between her testimony and that of Dr. Metz. More importantly, he assisted his client in misrepresenting her treatment by Dr. Metz by preparing and filing her affidavit of October 6, 1989 which he then knew to be false. Likewise, he did not call upon his client to correct the inconsistencies between her unsupported statements and Dr. Metz's statements which were supported by records.

Respondent also advanced the claim that Kourouvacilis was disabled from work as a result of the 1985 fire. Not only was this claim unsupported by any medical opinion but, it also jeopardized her concurrent claim for damages in the Monson case. Respondent and Kourouvacilis consistently maintained in the Monson case that she was ready, willing and able to work after her August, 1984 discharge from Monson State Hospital but could not find work until June, 1986. Nonetheless, respondent prepared and served answers to GM interrogatories which stated Kourouvacilis lost two weeks of wages in 1985 from "Adral Co." due to the 1985 fire, and represented that she was employed during 1985 as a data entry/word processor.

This conduct by respondent, found by the hearing committee,

constituted a lack of skill and care constituting neglect of a legal matter entrusted to him in violation of DR 6-101(A)(3) and a failure to zealously represent his client in violation of DR 7101(A)(1), (2), and (3).

**Disciplinary Rule 7-102(A)(2)**

Left with a lack of evidence to support his client's claims either because of neglect or because it was not there to begin with, respondent compounded his misconduct by misrepresenting facts and presenting unwarranted claims.

The appeal panel affirms the ruling that respondent knowingly advanced a claim that was unwarranted under the law, in violation of DR 7-102(A)(2). Regardless of whether respondent thought he was bringing a claim based on breach of warranty, res ipsa loquitur, or some other similar, novel theory, respondent knowingly advanced a claim for which he had no evidence of personal injury to Kourouvacilis, thus advancing a claim unwarranted under the law.

The appeal panel agrees with respondent that in the context of Canon Seven violations requiring a "knowing" violation,[3] a finding that the respondent "knew or should have known"[4] will not satisfy the required element of "knowledge." To hold that a

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[3]For purposes of respondent's charged violations, these include: DR 7-102(A)(2) (knowingly advancing a claim or defense unwarranted under the law); DR 7-1102(A)(5) (knowingly make a false statement); and DR 7-102(A)(7) (counsel or assisting client in conduct known to be illegal or fraudulent).

[4]*See, e.g.* Hearing Committee Report p. 10 (respondent "knew or should have know" he lacked facts to establish prima facie liability and he "knew or should have known" he lacked the elements for a res ipsa case); Hearing Committee Report p. 15 (respondent "knew or should have known" his client's answers to

"knew or should have known" standard satisfies the knowledge requirement of Canon Seven violations implies a state of mind no more culpable than neglect. DR 6-101(A)(3) addresses neglect. To hold that "knew or should have known" is equivalent to "knowledge" would cause DR 7-102 violations to be subsumed by DR 6-101(A)(3) violations. However, this does not relieve respondent of his responsibility under DR 7-102(A)(2),[5] because there were sufficient findings in the Hearing Committee Report, as well as in the Supplemental Findings of the Hearing Committee, indicating respondent had actual knowledge.

Respondent "knew he had no competent evidence of personal injury damages," is well supported in the evidence (Supplemental Findings at 3). Kourouvacilis never complained of any injury or conditions requiring medical care when she initially met with respondent on November 20, 1985. The insurance report stated that there were no injuries as a result of the fire. Carol Mathison's letter to respondent stated that Kourouvacilis had not complained of any physical injury resulting from the 1985 fire and she could not provide an expert opinion as to the cause of Kourouvacilis' post-traumatic stress disorder. Dr. Metz had no record of treatment for migraine headaches after the November, 1985 fire. Respondent prepared and served answers to Avis interrogatories for his client as late as August 31, 1989, which stated Kourouvacilis received and incurred no medical bills

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interrogatories were inconsistent); Hearing Committee Report p. 23 (respondent "should have known" the claims of unemployment were false); Hearing Committee Report p. 28 (respondent "must have known" expert evidence regarding defective wiring would be difficult to get absent an expert inspection); Hearing Committee Report p. 31 (respondent failed to correct his client's false statements that he "knew or should have known" were false.

[5]Similarly, respondent's liability under DR 7-102(A)(7) is not diminished.

from the fire to the best of her knowledge. The only evidence of an injury were the assertions of Kourouvacilis which were unsupported and highly contradictory.

Respondent had insufficient evidence to establish the requisite liability, that is to prove a design defect existed in the Monte Carlo. In *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 575 N.E.2d 7334 (1991), the Supreme Judicial Court reviewed respondent's theory of liability on her appeal of the trial court's allowance of the defendants' motion for summary judgment and noted: "[Kourouvacilis'] response to the defendants' motions is woefully inadequate, and indicates that she has absolutely no competent evidence that the vehicle was defective when purchased or that any such alleged defect was the proximate cuase of her damages." *Id.* at 771-712.[6]

Respondent similarly did not have sufficient evidence to proceed on a theory of res ipsa loquitur. Respondent knew the care never operated properly after the 1983 accident, as he alleged in those proceedings that the Monte Carlo did not operate well, required frequent repairs and was not safe to operate. Moreover, the Supreme Judicial Court briefly addressed the validity of this theory, stating:

> There is no merit to the plaintiff's argument that, even without expert testimony, she can prove her case by invoking the doctrine of res ipsa loquitur. The common experience of mankind in no way suggests that the unexplained fire in an

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[6]Merely losing the motion for summary judgment does not constitute a disciplinary violation. The reason there was no claim warranted under law was because the facts did not support the claim to begin with, regardless of prompt and adequate preparation. Nevertheless, respondent neglected the case and failed to zealously represent his client and persisted in pursuing the claim through a combination of misrepresentations of evidence and facts.

automobile six years after its purchase was caused by a defect in the vehicle that had existed from the time of the vehicle's manufacture of sale.

410 Mass. At 717. (citations omitted)

The Supreme Judicial Court declined to sanction respondent. *Id.* at 717. The issue before the court was to decide whether or not the rule established by the United States Supreme Court in *Celotex Corp. v. Cartrett*, 477 U.S. 317, 322; 106 S. Ct 2548, 2552 (1986), should be adopted by the Massachusetts Supreme Judicial Court, and therefore the SJC held it was not appropriate to issue sanctions. *Id.* at 711, 717.

However, the court did not have information on respondent's neglect of the case, his poor preparation and his failure to zealously represent his client. Further, the court did not have occasion to review the issue of damages or the dishonest manner in which respondent procured affidavits concerning liability. While this is relevant to bar discipline, it was not relevant to consideration of the summary judgment. Therefore, the decision not to impose sanctions does not provide a safe harbor for the respondent. As discussed above, even if respondent had been able to establish liability, there was insufficient evidence to prove damages and thus the pursuit of the claim was unwarranted under the law, in violation of DR-7-102(A)(2).

**Disciplinary Rule 7-102(A)(5), (7) & 7-102(B)(1)**

The appeal panel also affirms the Hearing Committee's ruling that respondent knowingly assisted his client in perpetrating a fraud in violation of DR 7-102(A)(7) and DR 7-102(B)(1), but, did not violate DR 7-102(A)(5). The respondent: (1) failed to recognize false statements in the client's testimony that were central to the case and failed to call upon his client to rectify the false statements; and (2) prepared and answers to interrogatories and affidavits that were clearly based on incorrect statements of

fact that the respondent knew to be false at the time of filing.

This case does not merely involve an attorney representing a client who has lied. Respondent's behavior crossed over from representing a client who was untruthful to facilitating the client's dishonesty. Not only did respondent fail to recognize material misstatements of his client, but he prepared and filed sworn statements and other pleadings with the court, based on these misstatements, thus facilitating his client's dishonesty.

The respondent failed to recognize material misstatements in Kourouvacilis' testimony regarding the condition of the Monte Carlo. These misstatements concerned issues that had been central to the Monson case and were likewise central to the claims arising out of the 1985 fire. Respondent had settled the 1983 accident one month prior to the 1985 fire. He knew the 1983 accident involved considerable property damage to the Monte Carlo, in fact he alleged in that action the car did not operate well, required frequent repairs, and was unsafe to drive. Nevertheless, on April 13, 1989, Kourouvacilis testified, in respondent's presence, that the Monte Carlo had required only routine maintenance after the 1983 accident, until the 1985 fire. Respondent did not call upon his client to rectify this false statement, thus aiding his client in perpetrating a fraud.

Kourouvacilis also testified on April 13, 1989, that she last saw Dr. Metz in 1988 for treatment of migraine headaches caused by the 1985 fire. The subsequent depositions of the keeper of records of Dr. Metz's office, Dr. Metz himself, as well as respondent's own examination of the records indicated that Dr. Metz last saw her in January, 1985, and that she had a negative EEG performed in February, 1985, approximately nine months before the 1985 fire. Despite this evidence indicating Kourouvacilis had falsely testified at her deposition, respondent did not call upon his client to clarify the misstatement.

Instead respondent prepared and filed an affidavit with the court, and served answers to interrogatories on behalf of Kourouvacilis, that he knew were false. On September 15, 1989

respondent received a copy of the transcript of Dr. Metz's deposition from July 26, 1989, which respondent did not attend. Three days later, after he had reviewed the deposition transcript, he contacted Kourouvacilis by letter, stating:

> Dr. Metz stated that he last saw you in January of 1985. Your accident was in October of 1985. . . . It is not helpful to have misinformation in your interrogatory answers and your deposition. If you have any written indication that you saw Dr. Metz at any time after October of 1985 please produce it for me in my office.

Hearing Committee Attachment A.

Respondent received no records documenting Kourouvacilis' visits with Dr. Metz.[7]

Nevertheless, less than three weeks later, on October 6, 1989, respondent prepared and filed Kourouvacilis' affidavit in opposition to summary judgment in which she stated she had been treated by Dr. Metz in October, 1985, and that she had bills from this treatment. Respondent's September 18, 1989, letter provides clear evidence that respondent knew then that the facts in Kourouvacilis' affidavit, which he later prepared and filed, were untrue. When respondent prepared and filed her affidavit containing this misinformation, he knowingly assisted his client in making a false and fraudulent statement of fact to the court.

Respondent prepared and served answers to GM interrogatories on May 8, 1989, that identified Carol Mathison, Dr. Metz, and Walter Grzebien, as expert witnesses he had retained. When he prepared these answers, respondent knew that none of the identified experts had been retained in the case, let alone held opinions which supported his client's claims.

Respondent persisted in representing that Dr. Metz and Mr. Grzebien were expert witnesses whose opinions supported his client's claims in answers to Avis interrogatories prepared and served on August 31, 1989. In these answers to interrogatories,

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[7]This was respondent's second request for records documenting Kourouvacilis' visits and bills from Dr. Metz. His first request of April 14, 1989, similarly produced no response.

respondent also represented that Lt. Colburn would testify as an expert. Similar to Dr. Metz and Mr. Grzebien, respondent also knew that he had not consulted or retained Lt. Colburn as an expert.

Additionally, respondent prepared and filed documents he knew were false with regard to Kourouvacilis' employment status. Respondent filed a complaint on December 1, 1987, in the Monson case, alleging Kourouvacilis was unemployed from October, 1984, through June, 1986, despite being able to work. Less then two years later, on March 2, 1989, in answers to GM interrogatories, respondent represented that Kourouvacilis was employed, and lost wages during 1985, the same time frame during which respondent had previously claimed she was unemployed. In fact, Kourouvacilis had been employed by Admail in May, 1986, and at United Technologies/Hamilton Standard from June 9, 1983 through June 12, 1986. Respondent could have obtained this information with minimal effort which could have clarified these misstatements regarding his client's employment. Notwithstanding this, at the very least, respondent knowingly provided answers to GM interrogatories in March, 1989, which were in clear contradiction to the complaint he filed in December, 1987, in the Monson case.

Respondent repeatedly ignored the facts that did not support his client's claims on issues of liability, loss of earning capacity and physical injuries. Despite this repeated evidence that his client's claims could not be supported, he prepared and served answers to interrogatories containing false information on these subjects and he resisted summary judgment based on false statements on these matters in an affidavit he prepared for his client to sign and which he submitted to the court to oppose the summary judgment. Respondent knew there were false statement of material facts in his client's deposition testimony and answers to interrogatories, yet failed to call upon her to correct these misstatements. Similarly, respondent knew he prepared and filed sworn answers to interrogatories and an affidavit that were

clearly based on incorrect statements of fact. This conduct amounted to a violation of DR 7-102(B)(1) and DR 7-102(A)(7).

**Disciplinary Rule 1-102(A)(4), (5), & (6)**

Bar counsel appealed from the hearing committee's decision to dismiss the alleged violations of DR 1-102(A)(4), (5), and (6). Based upon its review of the findings in the hearing committee report, the appeal panel revised the report to find and rule that the respondent further engaged in fraudulent, dishonest conduct which was prejudicial to the administration of justice, and reflected adversely upon the respondent's fitness to practice in violation of DR 1-102(A), (5), and (6).[8] The respondent: (1) prepared and served opposing counsel with discovery material and pleadings based on false statements of fact the respondent knew to be false; (2) fraudulently procured affidavits; (3) permitted deposition testimony to stand uncorrected when he knew it contained false statements; and (4) engaged in conduct that delayed litigation, complicated discovery, and wasted the time and resources of the courts.

Respondent prepared and served answers to interrogatories that he knew were false. It is immaterial that the other party was not fraudulently induced to rely upon respondent's misrepresentations. It is sufficient that respondent made representations that he knew to be false. See *Matter of McCarthy*, 416 Mass. 423, 430 (1993).

Respondent prepared and served answers to interrogatories, regarding Dr. Metz, that he knew were false. Respondent indicated that Dr. Metz was his medical expert, even though he had not spoken to him, had not retained him, and in fact never

[8]Supreme Judicial Court Rule 4:01, Section 8(3) authorizes the panel to make such a revision since it does not involve the determination of the credibility of any witness's testimony.

intended to call him as a witness. Despite knowledge that Dr. Metz had not seen Kourouvacilis after the 1985 fire, evidenced by respondent's letter to Kourouvacilis noting there was misinformation in her interrogatory answers, respondent still prepared and filed his client's affidavit stating she had been treated by Dr. Metz after the 1985 fire, and she had bills to prove it.

Similarly, respondent prepared and filed answers to interrogatories falsely representing that Lt. Colburn would testify as an expert to the cause of the 1985 fire. At the time the answers were filed, respondent knew Lt. Colburn had not been retained as an expert and did not remember anything about the fire, not to mention an opinion of the cause and origin.

Respondent fraudulently procured statements. He drafted statements for Grzebien and Lt. Colburn without speaking to either of them. In addition, he withheld material information from Grzebien's statement. A single incident of failing to speak to a witness may amount only to neglect, and or the failure to zealously represent the client. However, respondent's behavior was repeated and was prejudicial to the administration of justice because he filed statements and answers to interrogatories to resist the motions for summary judgment.

Kourouvacilis testified the Monte Carlo required only routine maintenance after the 1983 accident. This was not only contrary to Kourouvacilis' previous testimony but, contrary to respondent's claims in the 1983 accident case, that the car never functioned properly after the accident and was dangerous to drive. Respondent did not correct the testimony or call upon his client to do so.

Respondent pursued the claims arising from the 1985 fire based on false statements and the affidavit he prepared for his client which he knew contained materially false information. Even after the trial court entered summary judgement against his client, respondent continued to rely on these false statements and appealed the trial court's ruling to the Supreme Judicial Court.

By preparing and filing documents known to the respondent to contain false statements, the respondent wasted the time and resources of the court and the opposing parties. This conduct constitutes violations of DR 1-102(A)(4), (5), and (6).

**Disposition**

Respondent's behavior warrants a suspension from the practice of law for two years. Respondent prepared affidavits and pleadings known to him to include materially false statements for the court's consideration, warranting a one-year suspension. See *In the Matter of Friedman*, 7 Mass. Atty. R. 100 (1991). In addition, he perpetrated a fraud on opposing counsel by actively misrepresent the facts of his client's case, which also warrants a sanction of one year's suspension. See *Matter of Neitlich*, 413 Mass. 416 (1992). Moreover, respondent failed to call upon his client to correct false deposition testimony when he had an opportunity to do so, which again warrants a sanction of one year's suspension. See *Matter of McCarthy*, 416 Mass. 423 (1993).

Respondent's behavior warrants the additional sanction of two years because in addition to the above violations warranting one year's suspension, he also neglected a legal matter entrusted to him. Respondent also has a prior disciplinary matter against him for which he received a public censure.[9] The prior discipline involved charging a fee in a personal injury case in excess of the fee contained in the contingent fee agreement, refusing to turn over to the client the portion of the recovery to which the client was indisputably entitled, and withholding funds from the client to pay another attorney without the client's consent. *Matter of*

[9]A public censure is the equivalent to a current public reprimand.

*Kerlinsky*, 406 Mass. 67 (1989). In further aggravation, respondent lacks any appreciation that his behavior was improper and violated the Canons of Ethics.

**Conclusion**

For the foregoing reasons, the appeal panel revises the findings and rulings of the hearing committee to include a violation of DR 1-102(A)(4), (5), and (6) and otherwise adopts the findings and rulings of the hearing committee but recommends that respondent be suspended from the practice of law for two years, and strongly suggests respondent complete continuing legal education courses in ethics, and pass the MPRE between the date of suspension and any petition for reinstatement.

Daniel C. Crane, Esq.
*Chair*
Naomi Gordon
Richard P. Melick, Esq.

Date:

COMMONWEALTH OF MASSACHUSETTS
BOARD OF BAR OVERSEERS
OF THE SUPREME JUDICIAL COURT

| | |
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| BAR COUNSEL,<br><br>Petitioner<br><br>vs.<br><br>LOUIS KERLINSKY, ESQ.,<br><br>Respondent | BBO FILE NO. C6-91-0124 |

## INTRODUCTION

On May 23, 1994, Bar Counsel filed a Petition for Discipline alleging misconduct by the Respondent, Louis Kerlinsky, an attorney duly admitted to the practice of law in Massachusetts on October 22, 1952. On June 1, 1994, the Respondent filed an "Answer to Disposition Memo & Petition".

The Petition for Discipline alleges violations of Canon One, DR 1-102 (A)(4), (5) and (6); Canon Six, DR 6-101(A)(3) and Canon Seven, 7-101(A)(1, (2) and (3), DR 7-102 (A)(2), (5) and (7) and DR 7-102 (B)(1).

A Hearing Committee conducted hearings in the matter on October 12, 1994, December 14, 1994, January 17, 1995, February 14, 1995, February 15, 1995 and March 3, 1995. The following witnesses testified before the Hearing Committee: Louis Kerlinsky, Esq. and Wayne Soini, Esq. One-hundred and sixty-seven separate exhibits were introduced into evidence by the parties.

Attorney S. Thomas Martinelli appeared for the Respondent and represented the Respondent throughout the hearings.

## FINDINGS OF FACT

1. The Respondent, Louis Kerlinsky, Esq., was duly admitted to the Bar of the Commonwealth on October 22, 1952. Since that time, he has primarily concentrated in Plaintiff's personal injury litigation.

2. From 1981 to date, the Respondent has represented Diane Kourouvacilis (Kourouvacilis") in a number of matters. These include:

a. In 1981, the Respondent represented Kourouvacilis in her divorce.

b. On August 4, 1983, the Respondent agreed to represent Kourouvacilis on a contingent fee basis in a claim for personal injury and property damage arising from an accident which had occurred on July 26, 1983 (the "1983 accident"). In the 1983 accident, another driver, Jerrold Towne ("Towne"), collided with Kourouvacilis while she was operating her 1979 Chevrolet Monte Carlo (the "Monte Carlo"). The Respondent brought suit against Towne in the Hampden Superior Court on June 4, 1984. The Towne case was settled by the Respondent, on behalf of Kourouvacilis, by payment of the policy limits from Towne's insurer and from Kourouvacilis' own insurer in October 1985.

c. On November 1, 1985, Kourouvacilis' Monte Carlo caught fire during operation and was destroyed (the "1985 fire"). On November 20, 1985, one month after having settled the Towne case, the Respondent agreed to represent Kourouvacilis, on a contingent fee basis, in a claim for damages against General Motors Corporation ("GM") and Avis Rent-A-Car ("Avis") arising from the 1985 fire.

d. On or about August 6, 1984, Kourouvacilis was discharged from her employment at Monson State Hospital for excessive absenteeism. On or about November 224, 1987, the Respondent agreed to represent Kourouvacilis, on a contingent fee basis, in claims arising from Monson's termination of her employment (the "Monson case"). On December 1, 1987, the Respondent filed suit on behalf of Kourouvacilis in the Hampden County Superior Court against the Commonwealth of

Massachusetts and Monson State Hospital for wrongful discharge and against AFSCME, Kourouvacilis' union, for allegedly violating its duty of fair representation. Monson was still pending at the conclusion of hearings on this matter.

3. Kourouvacilis had purchased the Monte Carlo in 1979 from Avis in Connecticut with over 17,000 miles on the odometer.

4. The Monte Carlo was seriously damaged in the 1983 accident. In addition, Kourouvacilis claimed, and the Respondent alleged, on her behalf in the claim against Towne, that the 1983 accident caused her to suffer from migraine headaches for which she received treatment from Dr. Metz.

5. On November 27, 1985, the Respondent sent demand letters on Kourouvacilis' behalf pursuant to G.L. c. 93A to GM, which had manufactured the Monte Carlo, and to Avis, which had sold the Monte Carlo to Kourouvacilis, regarding claims arising out of the 1985 fire.

6. The Respondent represented in the c. 93A demand letters that the Monte Carlo was not safe, that Avis and GM had willfully violated c. 93A and the "Connecticut Consumer Protection Act"; and that Kourouvacilis had sustained damages of $10,000 "because of the severe fright and mental anguish which she suffered as a result of this fire."

7. On October 27, 1988, the Respondent filed suit for personal injury and property damage resulting from the 1985 fire in the Hampden Superior Court on behalf of Kourouvacilis against GM and Avis (the "GM case") raising warranty, negligence, deceit, fraud, and c. 93A claims. The complaint alleged, among other things, that the 1985 fire had been caused by a "manufacturing or design defect" which was "present when said vehicle was sold by . . . GMC." The complaint also alleged that the 1985 fire had been caused by "defective wiring."

8. At the time of the 1985 fire, the Monte Carlo had over 73,000 miles on the odometer.

9. Lt. Colburn and Gerard Walsh of the Springfield Fire Department responded to the 1985 fire. Lt. Colburn filed a report stating that there were no personal injuries as a result of

the 1985 fire, that the source of ignition for the 1985 fire was an "unspecified short circuit", and that the "ignition factor" was "electrical failure".

10. On November 20, 1985, Kourouvacilis did not tell the Respondent that she had been injured in the 1985 fire, that she had sought medical treatment or incurred any medical bills. The Respondent did not, therefore, file a PIP claim on Kourouvacilis' behalf in connection with the 1985 fire as he had done in connection with the 1983 accident.

11. On November 20, 1985, the Respondent knew that the Springfield or Wilbraham fire department had responded to the 1985 fire and that the Monte Carlo had been towed to an auto body shop. He did not then contact the fire department for information or a report, nor did he ever take any steps to inspect the Monte Carlo nor to have the Monte Carlo inspected by a qualified expert.

12. In the two years and eleven months from November 20, 1985, when the Respondent agreed to represent Kourouvacilis, until the filing of the complaint in the GM case on October 27, 1988, the Respondent took the following actions with regard to the preparation of the GM case:

a. On November 27, 1985, the Respondent wrote to U.S.F. & G., Kourouvacilis' insurer, to ask for copies of photographs, the appraisal, and "any reports concerning the cause of the fire." On December 17, 1985, the Respondent received a letter from U.S.F. & G. enclosing the appraisal and photographs of the Monte Carlo. U.S.F. & G. advised the Respondent that the cause of the 1985 fire could not be determined.

b. Between November 1985 and January 8, 1986, the Respondent made no effort to preserve the Monte Carlo, to have it inspected by experts, or otherwise to investigate the cause of the fire. U.S.F. & G., Kourouvacilis' insurer, sold the Monte Carlo for salvage on or about January 8, 1986.

c. Between November 1985 and April 1988, the Respondent undertook no investigation of Kourouvacilis' claims, other than to write to GM on two occasions to request a settlement.

d. On April 4, 1988, the Respondent wrote to Kourouvacilis to advise her that the Statute of Limitations would expire on the GM case at the end of October 1988. In the letter, the Respondent advised Kourouvacilis not to bring suit because the only damages she had incurred were to her car, which had been paid for by U.S.F. & G., her insurer. At the same time, the Respondent requested that she sent $80.00 if she desired to file suit notwithstanding his advice.

e. On May 7, 1988, the Respondent received a letter from a claims representative for GM requesting his expert's report, the title to the Monte Carlo, names and addresses of witnesses, insurance documentation, and medical records and bills. The Respondent did not answer this letter. Instead, he wrote, for the first time, to the Springfield and Wilbraham fire and police departments for their incident reports.

f. The Respondent received Lt. Colburn's incident report on May 21, 1988. He did not understand how Lt. Colburn had decided on the entries in the report. On June 2, 1988, the Respondent wrote to Lt. Colburn, "We would appreciate your advising how you determined the fire was due to an electrical wire or electrical failure, and whether in you[r] opinion this was due to a manufacturing or design defect." Lt. Colburn called the Respondent's office on June 15, 1988, leaving his telephone number and the message that he did not remember anything about the 1985 fire. The Respondent never spoke to Lt. Colburn.

g. The Respondent met with Kourouvacilis on May 24, 1988. Kourouvacilis represented to the Respondent that she had purchased the Monte Carlo "brand new" from Avis and that it had required no repairs other than regular maintenance. The Respondent knew that Avis was a rental car agency and was unlikely to sell new cars, but he never obtained the registration of the Monte Carlo or took other action to determine whether or not Kourouvacilis had actually purchased the Monte Carlo new, even though it was important to the Respondent's theory of res ipsa loquitur to show that the Monte Carlo had been purchased new and that it was in the same condition at the time of the 1985 fire as when it left the factory. In addition, the Respondent knew

that the Monte Carlo had required repairs as a result of the 1983 accident and frequently thereafter, since he had asserted in the Towne case that as a result of the 1983 accident the Monte Carlo was unsafe to drive.

h. Kourouvacilis had been enrolled at Springfield Technical Community College ("STCC") in the fall of 1987 and spring of 1988. On June 2, 1988, the Respondent wrote to Kourouvacilis' STCC counselor, Carol Mathison, for a report regarding the effects of the 1985 fire on Kourouvacilis' physical condition. The Respondent knew that Kourouvacilis lacked physical manifestations of any emotional injury she might have sustained in the 1985 fire. In his letter to Mathison, the Respondent suggested "weight loss", "high blood pressure", and "smoke inhalation" as possible injuries which Mathison might document. Mathison's response of June 28, 1988, to the Respondent did not document any physical injuries, nor did it state any opinion, other than an "impression", regarding the effects of the 1985 fire on Kourouvacilis. Among other things, Mathison's letter reported that Kourouvacilis had described her short attention span and poor memory. The Respondent never discussed Mathison's letter with Mathison.

I. On October 27, 1988, the Respondent filed suit in the Hampden Superior Court on behalf of Kourouvacilis against GM and Avis because his client told him she wanted to sue. He alleged warranty, negligence, deceit, fraud, and c. 93A claims arising from the 1985 fire. The complaint alleged, among other things, that the 1985 fire had been caused by a "manufacturing or design defect" which was "present when said vehicle was sold by . . . GMC." The complaint also alleged that the 1985 fire had been caused by "defective wiring." The Respondent relied entirely upon his client in making these claims, having obtained no independent verification or expert advice or opinion and with the knowledge that those persons who had investigated the 1985 fire (Lt. Colburn and the U.S.F. & G. Investigator) either could reach no conclusion or did not remember the incident.

13. According to the Respondent's testimony, from the outset of the attorney-client relationship regarding the 1985 fire,

the Respondent delegated to Kourouvacilis the primary responsibility for locating an expert as to the cause of the 1985 fire and for documenting any medical problems she might have. The Respondent gave little or no guidance to Kourouvacilis as to what would be needed to prove the product liability case. Based upon the facts and proof assembled prior to the filing of the complaint in the GM case, the Respondent advised the client that she lacked actual damages to recommend proceeding with a claim. Although not mentioned in his letter to Kourouvacilis recommending against filing suit, the Respondent knew or should have known that he lacked facts sufficient to make out a prima facie liability case. The Respondent's position is that he viewed this case as a res ipsa loquitur case which would not require direct expert testimony of causation, but, from his handling of the Towne case involving the same Monte Carlo, he knew or should have known that he lacked the requisite elements to make out a res ipsa case on liability.

14. Commencing in December 1988, GM and Avis served the Respondent with document requests and interrogatories seeking a description of Kourouvacilis' physical injuries, an itemization of her damages, and the identity of expert witnesses expected to testify at trial. Several motions to compel and court orders were required before any detailed responses to interrogatories were provided by the Respondent.

15. On March 2, 1989, the Respondent filed Kourouvacilis' first set of answers to GM's interrogatories. The answers represented (a) that Kourouvacilis was under Dr. Lawrence Metz's care for migraine headaches "from smoke inhalation"; (b) that Kourouvacilis had been receiving "care and treatment" for "over one year" from her college counselor and continued to see her counselor "from time to time"; and (c) that Kourouvacilis had lost her job at "Adral Co." due to a two-week absence caused by the 1985 fire.

16. Kourouvacilis was deposed by GM and Avis on April 13, 1989. In preparation for the deposition, the Respondent told Kourouvacilis by letter that it would be helpful if she would obtain a statement from "auto mechanics regarding the cause of

your fire." Kourouvacilis called the Respondent after receiving this letter, leaving the message that her mechanic did only front-end and suspension work and did not do wiring but would be willing to help. Kourouvacilis also drafted a statement for the mechanic, whom she identified as "Grez", to sign. This statement recited that Grez did not do wiring or electrical repairs but that he had been advised by Kourouvacilis that the fire marshal thought the 1985 fire had been due to defective wiring. Using Kourouvacilis' draft and without talking to "Grez", whose true name is Walter Grzebien, the Respondent drafted a statement for his signature which omitted the disclaimer of experience with electrical repairs and substituted, "[b]ased on my experience and training", and attributed the cause of the 1985 fire to "defective wiring" installed by GM. Kourouvacilis delivered this statement to Grzebien and returned it, signed, to the Respondent on April 13, 1989.

17. At her deposition and in the Respondent's presence, Kourouvacilis falsely testified as follows:

a. The Monte Carlo had required only routine maintenance after the 1983 accident until the 1985 fire. This claim directly contradicted her prior deposition testimony and the Respondent's own representations in the Towne case that the Monte Carlo had never operated properly after the 1983 accident.

b. Kourouvacilis' father and brother had inspected the Monte Carlo after the 1985 fire, and her father had taken several photographs of the Monte Carlo after the 1985 fire which pictures had been provided to the Respondent. Kourouvacilis' testimony that her father and brother inspected the Monte Carlo after the 1985 fire contradicted her sworn interrogatory answer filed on March 2, 1989, that only the police and "[f]ire marshals" had inspected the Monte Carlo after the 1985 fire. In addition, the Respondent knew that he had never received photographs from Kourouvacilis taken by her father.

c. Kourouvacilis testified that she had seen Dr. Metz "within a few days" of the 1985 fire and had last seen him "[a] year ago [ ]" for migraine headaches caused by smoke inhalation. The Respondent allowed this representation to stand although he

knew that in the Towne case he had alleged that Kourouvacilis' migraines were caused by the 1983 accident. In addition, at the time of her deposition, Kourouvacilis had not produced any records or bills of any treatment by Metz after the 1985 fire as the Respondent had requested both at the time of his earlier responses to interrogatories or in a preparation for the deposition.

The Respondent allowed these representations to stand knowing that they were false or with reckless disregard for whether or not these claims were true or false. The Respondent did not, at any time during the prosecution of the trial or appeal of the GM case, call upon his client to correct these representations, and he continued to prosecute the GM case on the basis of these false statements.

18. In fact, Kourouvacilis had never consulted Dr. Metz for headaches after an office visit on January 18, 1985 and an EEG administered in his office on February 8, 1995 (see Attachment A), and she had not seen her college counselor, Carol Mathison, since June 30, 1988 (see Attachment B). Kourouvacilis' claims that she had lost her job and "Adral Co." in 1985 due to the 1985 fire were false and contradicted her claims in Monson that she had been unemployed from October 1984 until June 1986 despite her efforts to secure a job (see Attachment E). Nevertheless, the Respondent filed Kourouvacilis' answers to the interrogatories either knowing they were false or with reckless disregard for whether or not they were false.

19. On May 8, 1989, the Respondent filed supplemental answers to GM's interrogatories. These supplemental answers again identified Dr. Metz and Carol Mathison as expert witnesses regarding her alleged injuries and identified "Walter Grez" as her expert on the cause of the 1985 fire. The Respondent knew when he filed the May 8, 1989, supplemental answers that none of the identified experts had been retained in the case, that he had not spoken to any of the identified witnesses about the case, and that neither Dr. Metz nor Carol Mathison had expressed an expert opinion that the 1985 fire had caused Kourouvacilis' injury. Although the Respondent had a statement signed by Walter Grzebien, the Respondent had drafted it without talking with

Grzebien and without assuring himself that Grzebien, whom he knew to specialize in front-end work and alignments, had the qualifications and expertise to render an expert opinion regarding the cause of an electrical fire (see Attachment C).

20. On May 19, 1989, the Respondent examined Metz's records regarding treatment of Kourouvacilis. The records showed that Kourouvacilis' last visit to Metz's office was for and EEG on February 8, 1985, nine months before the 1985 fire had ever occurred. The EEG was negative. Regardless of the Respondent's state of mind prior to May 19, 1989 the Respondent knew from reviewing these records that Kourouvacilis had either intentionally or unintentionally misrepresented that she had been treated by Dr. Metz after the 1985 fire of November 1, 1985. The Respondent did not attempt to reconcile these records with Kourouvacilis' prior sworn statements, did not bring the contradiction to Kourouvacilis' or Dr. Metz' attention, and took no action to correct the record in the GM case regarding Kourouvacilis' medical care from Dr. Metz (see Attachment A).

21. On July 20, 1989, the Respondent filed "Plaintiff's Further Answers to Interrogatories" as a result of a successful motion by GM to compel further answers. The answers again misrepresented that Dr. Metz had treated Kourouvacilis for migraine headaches following the 1985 fire. In addition, the answers misrepresented Kourouvacilis' employment history by listing employment as "Data Entry, Word Processing, 1985, Springfield, MA". The Respondent knew or should have known that this last response was not consistent with Kourouvacilis' resume, upon which the Respondent relied for this answer. He also knew or should have known that Kourouvacilis was claiming contemporaneously, in her complaint and in interrogatory answers in the Monson case, that she had no employment in 1985.

22. GM and Avis deposed Dr. Metz and Grzebien on July 26, 1989. The deposition had been rescheduled once at the request of the Respondent; however, the Respondent did not attend either deposition because he was on trial in another matter.

GM and Avis continued the depositions to give the Respondent an opportunity to examine if he so desired. The Respondent never ordered the transcripts of the depositions, never requested funds from his client to do so, and never availed himself of the opportunity to cross examine these witnesses at a continued deposition. The Respondent also did not contact Metz and Grzebien to ask them about their testimony. Had he done so, he would have learned that Metz had testified, consistent with the records which the Respondent had seen on May 19, 1989, that he had not seen Kourouvacilis since January 1985 and had no knowledge of her condition after that time except for a negative EEG performed in his office in February 1985. If the Respondent had spoken to or received the deposition testimony of Grzebien, he would have heard that Grzebien did not consider himself an expert, had no opinion regarding the cause of the 1985 fire and had so informed Kourouvacilis previously.

23. On August 7, 1989, Grzebien talked to the Respondent by telephone. Grzebien complained about having been subpoenaed to a deposition and told the Respondent that it was "ridiculous" for him to be a witness since he did not "know anything [about] the Monte Carlo or what could cause the fire." The Respondent did not ask Grzebien about his deposition testimony, nor did he ask about Grzebien's training and expertise in automotive electrical systems. Instead, he attempted to secure Grzebien's agreement to the hypothetical theory that a car fire involving the electrical system of a car that was in the same condition as when the Monte Carlo left the factory must have been caused by some defect in the design or manufacture of the Monte Carlo.

24. GM and Avis deposed Carol Mathison, Arthur Kourouvacilis, and Peter Kourouvacilis, among others, on August 22, 1989. Arthur Kourouvacilis, Diane's father, and Peter Kourouvacilis, her brother, both testified that they had neither inspected no photographed the Monte Carlo after the 1985 fire. Carol Mathison testified that in her initial interview with Kourouvacilis, that Kourouvacilis stated that she had escaped the 1985 fire without injury and that she was not

qualified to identify the cause of the post-traumatic stress disorder she observed in Kourouvacilis when Kourouvacilis was enrolled in STCC and, therefore, could not provide the requisite nexus between the 1985 fire and Kourouvacilis' scholastic and emotional difficulties. She also testified that she had not been retained as an expert in the case. The Respondent attended these depositions.

25. On August 31, 1989, the Respondent filed answers to interrogatories propounded by Avis, after Avis moved successfully to compel answers. The interrogatory responses falsely identified Walter "Grez"; "Lt. Colburn, Fire Marshal"; Dr. Metz; and Carol "Mathison" as the Plaintiff's experts. The Respondent then knew that (i) he had neither consulted nor retained these or any other persons as experts, (ii) that he had never received an expert opinion from these persons and (iii) (a) from the message he had received from Lt. Colburn (see Finding of Fact Number 13f), (b) his discussion with Grzebien on August 7, 1989 (see Attachment D) and (c) the deposition of Mathison that none of the listed witnesses would testify in a way which supported his client's claim, on any theory.

26. The August 31, 1989, interrogatory answers also falsely represented that Kourouvacilis had sustained $36,000 in lost earnings due to her unemployment "for approximately 2 years after the [1985 fire] because of the an[xie]ty, emotional distress and post traumatic stress disorder . . . ." The Respondent knew that this claim was false or likely false because it directly contradicted Kourouvacilis' claims, in the Monson case, that she had been available for and had actively sought employment in 1985 and 1986 and had actually been employed in 1986 (see Attachment E).

27. The Respondent received the Grzebien and Metz depositions of July 26, 1989 on September 15, 1989. He wrote to Kourouvacilis that it was "not helpful to have misinformation in your sworn interrogatory answers and your sworn deposition" and demanded that she produce any documentation that she had seen Dr. Metz "at any time after October 1985". Kourouvacilis never did so, but the Respondent did not relent in pursuing the

claim in reliance on these sworn misstatements and did not call upon his client to correct the record.

28. On September 22, 1989, GM and, on September 28, 1989, Avis filed motions for summary judgment and for sanctions and other relief on the grounds that the Plaintiff was unable to demonstrate that any defect in the Monte Carlo caused the 1985 fire or that her alleged injuries were caused by the 1985 fire. In support of the motion, GM relied upon:

a. a sworn affidavit signed by Lt. Eugene Colburn that he was not a fire marshal, had not been retained as an expert, had no recollection of the Monte Carlo, and had no opinion on the cause of the 1985 fire;

b. the deposition testimony of Walter Grzebien that he had not seen the Monte Carlo after the 1985 fire, had no opinion on the cause of the 1985 fire, and had not been retained as an expert;

c. the deposition testimony of Dr. Metz that he had not seen Kourouvacilis since January 18, 1985, more than nine moths before the 1985 fire, and had no knowledge of any medical problems after that date; and

d. the deposition testimony of Carol Mathison that Kourouvacilis had told her she had not been injured in the 1985 fire and that Ms. Mathison was not qualified to render an expert medical opinion on the cause of Kourouvacilis' post-traumatic stress disorder.

29. The Respondent opposed the motion for summary judgment without consulting or communicating with Grzebien, Metz, Mathison, or Lt. Colburn. In support of his opposition, the Respondent filed an affidavit, signed by Kourouvacilis under the penalties of perjury, in which she falsely represented that she had been treated by Dr. Metz after the fire in October 1985 and that she had bills from him for treatment in 1986." The Respondent had still not been provided with copies of these bills. The Respondent filed this affidavit knowing that it was false or with reckless disregard for whether or not the affidavit was false.

30. The Respondent also filed as part of his opposition the unsworn statement of "_____ "Grez" ("Grez"

statement) which he had drafted based solely on information obtained from his client and his own modifications regarding Grzebien's qualifications which his client had taken to Walter Grzebien on April 13, 1989, to be signed. (see Finding of Fact Number 17 and Attachment D). The Respondent submitted this statement notwithstanding the fact that he had since had a direct discussion with Grzebien in which Grzebien contradicted the content of the Respondent-prepared statement (see Finding of Fact Number 24) and despite his knowledge of Grzebien's deposition testimony (see Finding of Fact Number 28).

31. The Hampden Superior court held a hearing on the defendants' motion to dismiss on October 10, 1989. Because the "Grez" statement was not signed under the pains and penalties of perjury, the court stated that it did not satisfy the requirements of Mass. R. Civ. P. 56. It was therefore disregarded by the judge in considering the motions for summary judgment.

32. On October 13, 1989, after the hearing on the motion for summary judgment, the Respondent visited Grzebien at his shop to have him sign the same statement under oath. The Respondent did not tell Grzebien that his statement would be offered as an expert opinion on the cause of the 1985 fire or that he would be called to testify as an expert at trial. The Respondent also did not ask Grzebien whether or not he considered himself an expert on automotive electrical systems or whether he could render an expert opinion on a car he had not examined after the 1985 fire. When Grzebien stated that he was not sure what caused the 1985 fire, the Respondent inserted the word "probably" before the opinion of cause in order to allay Grzebien's concern, and Grzebien signed the statement. The Respondent notarized Grzebien's signature and filed the statement with the court on October 13, 1989.

33. On November 1, 1989, the Hampden Superior Court granted the defendant's motion for summary judgment on the ground that the Plaintiff could not prove that the defect which caused the 1985 fire existed in the Monte Carlo at the time of purchase. The court disregarded the notarized "Grez" statement because it was not timely filed.

34. The Respondent continued to pursue Kourouvacilis' case against GM and Avis after the trial court granted summary judgment even though he had no expert opinion on the cause of the 1985 fire or on the case of injuries which Kourouvacilis alleged. He filed a motion for reconsideration and eventually appealed the case, which was transferred to the Supreme Judicial Court on its own motion. The Supreme Judicial Court upheld the trial court's order in Kourouvacilis v. General Motors Corp., 410 Mass. 706 (1991). The Court's decision is attached hereto and incorporated herein as Attachment F.

THE MONSON CASE

35. As set forth in Finding of Fact Number 3d., the Respondent agreed to represent Kourouvacilis in the Monson case on or about November 24, 1987 and filed suit on behalf of Kourouvacilis in the Monson case on December 1, 1987. Consequently, the GM case and the Monson case proceeded simultaneously from December 1, 1987 until the Supreme Judicial Court decision in 1991.

36. The Monson complaint alleged that "[a]s a result of the failure to reinstate the Plaintiff to her former position in October 1983, the Plaintiff was unable to obtain until June 1986 although she tried to obtain other employment." The apparent errors in this averment are that the Plaintiff sought reinstatement in October 1984, not in 1983, and that the Respondent left out the word "work" or "employment" after the word "obtain". Kourouvacilis and the Respondent consistently maintained, in the Monson case, at least until June 1994 that Kourouvacilis was ready, able, and available for work after her discharge from Monson but was unable to find work until June 1986.

37. Simultaneously, in the GM case, the Respondent participated in Kourouvacilis' filing of the following inconsistent statements (see Attachment E):

a. On March 22, 1989, in response to GM interrogatories, Kourouvacilis claimed two weeks' lost wages in 1985 and claimed that she lost her job at "Adral Co." because of absence due to the 1985 fire.

b. On April 13, 1989, at Kourouvacilis' deposition,

attended by the Respondent, Kourouvacilis testified that she worked in 1985 for "Admil".

c. On July 28, 1989, the Respondent provided further answers to GM interrogatories claiming that Kourouvacilis was employed at data entry/word processing in 1985. This was listed as her only employment.

d. On July 31, 1989, the Respondent provided answers to Avis interrogatories claiming lost wages "since the fire attributable in part to emotional distress".

e. On August 31, 1989, the Respondent provided further answers to Avis interrogatories stating that Kourouvacilis had no employment for two years after the accident due to anxiety and emotional distress "arising from the fire in the car sold to me by Avis" and claiming lost earning capacity for these two years of $36,000.

38. The Respondent should have known that the claims of unemployment in the Monson case for the period October 1984 through June 1986 were false, when the Respondent received and reviewed Kourouvacilis' tax records for the years 1984 and 1986, on or about April 20, 1989.

39. On May 15, 1989, simultaneously alleging in the GM case that Kourouvacilis was suffering from migraine headaches and emotional distress due to smoke inhalation from the 1985 fire, the Respondent filed interrogatory answers in the Monson case claiming that Kourouvacilis was being treated by Dr. Metz and by Carol Mathison and was unable to work from 1983 through 1987 due to migraine headaches and affliction of emotion distress due to the wrongful termination at Monson.

40. Attached hereto as Attachments A through E are a series of chronologies concerning this matter. The Hearing Committee adopts the contents of these Attachments as Findings of Fact and incorporates the content of these Attachments herein.

## DISCUSSION

### CANON SIX

DID THE RESPONDENT'S HANDLING OF THE GM CASE OR THE MONSON CASE CONSTITUTE "NEGLECT OF A LEGAL MATTER ENTRUSTED TO HIM" IN

VIOLATION OF DR 6-101 (A) (3)?

The Petition for Discipline alleges a violation of DR 6-101(A)(3). DR 6-101(A)(3) states that, "A lawyer shall not: (3) Neglect a matter entrusted to him."

The Committee's reading of a myriad of cases reported in the Mass. Attorney Discipline Reports alleging violations of DR 6-101(A)(3) and (A)(3) reveals that these provisions are closely related. In order to avoid running afoul of DR 6-101 (A)(3), a lawyer must respond to a client matter with a reasonable degree of care and skill in the performance of his duties.

In this instance, when the Respondent accepted the representation, the Respondent owed to his client the duty to assemble all facts reasonably necessary to fully and fairly assess the strengths and weaknesses of Kourouvacilis' case against GM and Avis and to serve his client's best interest by proceeding with suit or not as the facts and law warranted. The Respondent proceeded with suit without giving his client full and fair assessment of the case because he had failed to assemble the evidence necessary to make that assessment. While the Respondent's delegation to his client of the task of assembling certain evidence and information critical to the successful presentation of a claim does not in and of itself constitute neglect, the Respondent's failure to cause any party to preserve the Monte Carlo and inspect its condition so as to determine the cause of the 1985 fire, irreparably prejudiced his ability to fully and fairly assess the strengths and weaknesses of his client's claim.

After delegating to his client the primary responsibility for assembling medical and expert evidence, the Respondent failed to educate or assist his client regarding what information was needed to make out a prima facie case. Later, after receiving clear and unequivocal evidence that his client was (a) not successfully and adequately assembling evidence as to cause of the 1985 fire and (b) not responding to his requests for evidence of medical expenses and treatment, his continued delegation of these tasks to his client can only be categorized as neglect.

Lastly, when it became clear to the Respondent, or at least should have become clear to the Respondent, that information

provided him by his client with regard to her treatment by Dr. Metz and by Carol Mathison and the statement from Walter Grzebien, were contradicted by the sworn deposition testimony of each of these witnesses, the Respondent's failure to speak with or to continue the depositions of Dr. Metz, Ms. Mathison and Mr. Grzebien, so as to determine which version of the facts was correct, constituted neglect of the matter entrusted to the Respondent.

Accordingly, the Committee finds that the Respondent violated DR 6-101(A)(3).

CANON SEVEN

DID THE RESPONDENT'S CONDUCT, INCLUDING HIS FAILURE TO HAVE KOUROUVACILIS' AUTOMOBILE INSPECTED AFTER THE 1985 FIRE, HIS FAILURE TO CONSULT ANY PERSON REASONABLY QUALIFIED TO RENDER AN EXPERT OPINION ON THE CAUSE OF THE 1985 FIRE OR ON THE CAUSE OF KOUROUVACILIS' ALLEGED INJURIES, AND HIS FAILURE TO PRODUCE DOCUMENTATION REQUIRED TO OPPOSE THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THE GM CASE CONSTITUTE A VIOLATION OF CANON SEVEN, DISCIPLINARY RULES 7-101(a), 92) AND (3)?

When the Respondent agreed to represent Kourouvacilis for damages arising out of the 1985 fire, he knew that the fire occurred in a car with substantial mileage on its odometer, which had been seriously damaged in at least one earlier accident. Kourouvacilis' insurer, U.S.F. & G. advised that the cause of the 1985 fire could not be determined. He had no evidence that his client suffered or was treated for any personal injuries caused by the 1985 fire.

The Respondent made not attempt to preserve the Monte Carlo or have it inspected before it was sold for salvage on January 8, 1986. In 1988, he received the fire department report which listed "electrical failure" as the "ignition factor", a conclusion later characterized as a guess by Lt. Colburn, the writer of the report.

Between November 1985 and May 1988, the Respondent undertook no investigation of Kourouvacilis' claims, other than to write to GM on two occasions to request a settlement.

The Respondent delegated the entire responsibility for locating an expert as to the cause of the 1985 fire and for documenting any medical problems she might have to Kourouvacilis. The Respondent gave no guidance to Kourouvacilis regarding what would be needed to prove this product's liability case, even though he knew that she lacked the education and experience to document the case.

In order to prevail against either Avis or GM, the Respondent would have to prove that the wiring was defective and that the defect was present when Avis or GM last had possession of the Monte Carlo. Ultimately, he was unable to show any evidence to such effect, and he knew in November 1985 that he had no such evidence. He also must have known that without an expert inspection of the vehicle, he was unlikely to get such evidence.

The result of such an inspection probably would not have helped the case, but might have ended it before it began. Without such an inspection, any recovery would be a virtual impossibility.

Given the absence of evidence of personal injury and the age and condition of the Monte Carlo, the Respondent may well have advised against the expense of an expert investigation and dissuaded Kourouvacilis from making her claim, To pursue the claim without investigating and collecting the necessary evidence constituted, a violation of Disciplinary Rules 7-101(A)(1), (2) and (3). If there was a claim, the chance of proving it was lost when the Monte Carlo was sold for salvage.

Moreover, the claim that Kourouvacilis was disabled from work by the 1985 fire was unsupported by any medical opinion. It was also inconsistent with her claim in the Monson case that she was able to work. Pressing these unsupported assertions of disability put Kourouvacilis' claim for damages in the Monson case at serious risk. Such conduct by the Respondent violated Disciplinary Rules 7-101(A)(3).

DID THE RESPONDENT'S FILING OF PLEADINGS IN

THE GM CASE WITHOUT GOOD GROUND FOR SUPPORT CONSTITUTE A VIOLATION OF CANON SEVEN, DISCIPLINARY RULES 7-102(A)(2)?

In Kourouvacilis v. General Motors Corp., 410 Mass. 706, 575 N.E. 2d 734 (1991), the Supreme Judicial Court reviewed the Respondent's theory of liability and the evidence presented at summary judgment on the issue of liability. The issue before the Court was the nature of the burden on the parties to a summary judgment motion.

Agreeing that "[Kourouvacilis] has absolutely no competent evidence" as to liability, the Court nevertheless declined to impose damage sanctions:

"The defendants characterize the plaintiff's appeal as 'frivolous' and ask for damages pursuant to Mass. R. App. P. 25, as amended, 378 Mass. 925 (1979). See Glorioso v. Retirement Bd. Of Wellesley, 401 Mass. 648, 518 N.E. 2d 851 (1988). We agree that much of the plaintiff's appellate argument is without merit. However, the central issue was whether we would adopt the rule laid down in Celotex Corp. V. Catrett, supra, a question to which we have previously alluded but, until today, have not answered. In those circumstances, it would not be appropriate for us to deem this appeal frivolous. We decline to award damages pursuant to Rule 25."

Missing from the Court's discussion is the issue of damages. From the outset, the Respondent had no reasonable belief that a claim for personal injuries could be supported by any medical opinion. If somehow he had established liability for the 1985 fire, his case would have ended there. He never had evidence to support damages.

For the Respondent to have proceeded as he did was a violation of Disciplinary Rules 7-102(A).

DID THE RESPONDENT'S FILING OF PLEADINGS AND AFFIDAVITS WHICH CONTAINED STATEMENTS HE KNEW TO BE FALSE OR WITH RECKLESS DISREGARD FOR WHETHER THE STATEMENTS MADE THEREIN WERE TRUE OR FALSE AND HIS FAILURE TO CALL UPON HIS CLIENT TO CORRECT FALSE

REPRESENTATIONS AND TO WITHDRAW WHEN THOSE FALSE STATEMENTS WERE NOT RECTIFIED CONSTITUTE VIOLATIONS OF CANON SEVEN, DISCIPLINARY RULE 7-102(A)(5) AND (7); AND CANON SEVEN, DISCIPLINARY RULE 7-102(B) (1)?

The Respondent should not be held to remember or constantly to check insignificant details in a client's file. The Respondent should be able reasonably to rely on factual statements of his client which are logical on their face.

In the GM case, there were two issues: the condition of the Monte Carlo at the time of the 1985 fire, and the damage to Kourouvacilis.

The Respondent had settled the Towne case one month before the 1985 fire. The Towne case involved substantial property damage to the same Monte Carlo, and contained averments of Kourouvacilis that the Monte Carlo did not operate well, required frequent repairs, and was unsafe to drive.

The Respondent had no evidence to support his client's testimony that she was being treated by Dr. Metz for problems caused by smoke inhalation. Her assertions that she lost work because of the 1985 fire correctly contradicted her statements in the Monson case that she was able to work. In May 1989, the Respondent knew that Dr. Metz stated he had not treated Kourouvacilis since February 1985.

These are not minor discrepancies. They are at the center of the case. If the Respondent had corrected the record when he knew or should have known them to be false, his case would have ended. He was, however, obliged to do so and his failure constituted a violation of Disciplinary Rules 7-102(B)(1). It follows that in preparing and filing discovery materials and pleadings based on clearly incorrect statements of fact, the Respondent violated Disciplinary Rules 7-102(A)(7).

CANON ONE

Having found violations of Canons Six and Seven, the Committee declines to make findings of specific violations of Canon One.

The Respondent filed discovery materials containing false

information and failed to correct statements of his client which he knew or should have known to be false. This conduct falls within the proscriptions of Canon Six and subjects the Respondent to disciplinary action.

Under all of the circumstances of the case, however, the evidence is insufficient to support a finding that there was fraud or deceit within the customary meaning of those terms. The Respondent's motives were to keep the case alive. He did not reasonably believe that the Defendants would take the false information at face value and rely to their detriment upon it. The Defendants did not believe the information and did not rely on it. They used the legal means at their disposal and ultimately suffered no direct detriment over and above the cost of defending the appeal. The Committee finds that this falls below the standard required to make a finding of a specific violation of Canon One, DR 1-102(A)(4).

The Committee does acknowledge that the conduct of the Respondent delayed the litigation, obfuscated the discovery process and ultimately presented the Supreme Judicial Court with very weak "Facts" upon which to decide a novel question of law. The Committee recognized that such conduct of the Respondent may have been prejudicial to the administration of justice. In the opinion of the Committee, however, the Committee finding that such conduct violated Canons Six and Seven sufficiently addresses the extent to which the Respondent violated the disciplinary rules.

The Committee does not find that the Respondent is unfit to practice law.

OTHER FACTORS

In recommending discipline, the Hearing Committee has considered the prior discipline of the Respondent. Further, the Respondent does not acknowledge that any of his conduct in any way violated the Canons of Ethics and shows no remorse.

In mitigation, the Hearing Committee finds that the Respondent did not act out of avarice and genuinely believes that his actions were in the best interests of his client. His client did not complain of his conduct. The Supreme Judicial Court did not

see fit to impose sanctions for his aggressive fight on liability in spite of its finding that there was "absolutely no competent evidence" to support his theory.

RECOMMENDATION FOR DISCIPLINE

The Committee recommends that the Respondent be suspended from the practice of law for a period of one year and readmitted only upon application and the satisfactory completion of an ethics examination.

HEARING COMMITTEE

Date: December, 1995

By James P. Rooney /s/
James P. Rooney, Chair

By Joel S. Greenberg /s/
Joel S. Greenberg, Member

By Michael E. MacDonald /s/
Michael E. MacDonald, Member

# ATTACHMENT A

Chronology Regarding Dr. Metz' Treatment of Diane Kourouvacilis

| | |
|---|---|
| 7/26/83<br><br>1983 accident with Towne. | 10/18/83<br><br>Respondent correspondence to Dr. Metz for bills and medical reports concerning Dr. Metz' treatment of Kourouvacilis following the 1983 accident. |
| 12/1/83<br><br>Respondent correspondence to Kourouvacilis for her copies of bills and reports from Dr. Metz. Respondent also asks Kourouvacilis whether she has stopped treatment. | 12/11/84<br><br>Date of Dr. Metz report to Respondent. Dr. Metz indicates that the medications controlling Kourouvacilis' migraines but that when she is off her medication, the migraines become more severe. Kourouvacilis experiences migraines two to three times a week and is unable to work. Dr. Metz' prognosis is that the condition will improve with time. |
| 1/18/85<br><br>Kourouvacilis last sees Dr. Metz for migraines resulting from the 1983 accident. | 2/8/85<br><br>Kourouvacilis is seen at Dr. Metz' office for an EEG which is negative. |
| 2/25/85<br><br>Kourouvacilis' deposition in the Towne case. Kourouvacilis testifies that her absenteeism at Monson State Hospital is due to her medical problems from the 1983 accident. | 5/8/85<br><br>Dr. Metz' bill to Kourouvacilis showing last visits as 1/18/85 and 2/8/85. |
| 7/10/85<br><br>Dr. Metz' correspondence to Kerlinsky indicates that he last saw Kourouvacilis on 1/18/95, that she is progressing well and he thinks that her migraine condition is improving. | 11/1/85<br><br>1985 fire which gives rise to the GM case. |

# ATTACHMENT A

Chronology Regarding Dr. Metz' Treatment of Diane Kourouvacilis

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|---|---|
| 11/20/85<br><br>Respondent is retained by Kourouvacilis regarding the 1985 fire; Kourouvacilis mentions no medical problems in the intake interview. | 5/24/88<br><br>Respondent meets with Kourouvacilis. Respondent's notes state, "Inhaled smoke, Dr. Metz was seeing her". |
| 3/2/89<br><br>Respondent files answers to GM interrogatories stating that Kourouvacilis is under Dr. Metz' care for migraines due to smoke inhalation, no medical bills are listed or provided. | 4/13/89<br><br>Kourouvacilis is deposed by General Motors; Kourouvacilis states, in the Respondent's presence, that she saw Dr. Metz after the fire for migraines and that she last saw Dr. Metz sometime in 1988. |
| 4/14/89<br><br>Respondent correspondence to Kourouvacilis requesting records of her visits and bills from Dr. Metz; Kourouvacilis produces nothing in response. | 5/8/89<br><br>Supplemental Answers to General Motors interrogatories: Respondent identifies Dr. Metz as his medical expert; the Respondent had not spoken to Dr. Metz, had not retained him and states at hearing that he never intended to call Dr. Metz as a witness. |
| 5/19/89<br><br>Deposition of the Keeper of the Records of Dr. Metz office. Keeper produces records showing Kourouvacilis' last meeting directly with Dr. Metz on 1/18/85, the taking of a negative EEG on 2/28/85. | 7/20/89<br><br>Respondent provides further answers to GM interrogatories, stating that Dr. Metz treated Kourouvacilis for migraines resulting from smoke inhalation during the 1985 fire. |

# ATTACHMENT A

Chronology Regarding Dr. Metz' Treatment of Diane Kourouvacilis

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| 7/26/89<br><br>Dr. Metz' deposition by General Motors (Respondent did not attend deposition). | 8/31/89<br><br>Respondent provides further answers to Avis interrogatories listing Dr. Metz as an expert witness but stating that Kourouvacilis received and incurred no medical bills regarding the fire, to the best of her knowledge. |
| 9/15/89<br><br>Respondent receives a copy of Dr. Metz' deposition of 7/26/89. | 9/18/89<br><br>Respondent correspondence to Kourouvacilis stating that he has now received and reviewed the depositions of Dr. Metz and Walter Grzebien, "Dr. Metz stated that he last saw you in January of 1985. Your accident was in October of 1985. Mr. Grzebien stated that he had no idea as to the cause of your fire. It is not helpful to have misinformation in your sworn interrogatory answers and your sworn deposition. If you have any written indication that you saw Dr. Metz at any time after October of 1985, please produce it for me in my office." Kourouvacilis never produces the requested proof of treatment. |

# ATTACHMENT A

Chronology Regarding Dr. Metz' Treatment of Diane Kourouvacilis

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|---|---|
| 10/4/89<br><br>Respondent prepares affidavit for Kourouvacilis, stating that she saw Dr. Metz after the fire on receipt bills in 1986. | 10/6/89<br><br>Respondent files Kourouvacilis' sworn affidavit in opposition to General Motors' and Avis' motion for summary judgment. Paragraph 1 states, "I Diane Kourouvacilis on oath depose and say that I testified truthfully at my deposition, that Dr. Metz treated me after the fire in my General Motors' car in October of 1985. I had bills from him for this treatment in 1986" |

# ATTACHMENT (B)

Chronology Regarding Carol Mathison's Treatment of Diane Kourouvacilis

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|---|---|
| 11/1/85<br><br>1985 fire. | 11/4/87<br><br>Kourouvacilis begins seeing Carol Mathison as a counselor. In Mathison's deposition, she indicates that Kourouvacilis told her that she escaped the 1985 fire without injury. |
| 5/24/88<br><br>Respondent meets with Kourouvacilis. Kourouvacilis indicates that she has seen Mathison for treatment. | 6/?/88<br><br>Respondent correspondence to Mathison requesting a report of her findings and stating that, "She needs to establish that she suffered both mentally and physically, if such is the case, from the incident as she cannot recover for her emotional distress unless she had severe physical manifestations such as weight loss or high blood pressure, etc., or unless she sustained some physical injury such as smoke inhalation which relates to her emotional and mental injury. |
| 6/28/88<br><br>Mathison correspondence to Respondent with her report. | 6/30/88<br><br>Kourouvacilis last see Mathison. |
| 12/5/88<br><br>Respondent responds to Avis request for information by forwarding Mathison's report and asking for a settlement offer. | 3/2/89<br><br>Respondent answers GM interrogatories stating that Kourouvacilis saw Mathison for over a year and continues to see Mathison "from time to time". The Respondent knew from answer to Interrogatory Number 23 that Kourouvacilis left school in 1988 and that Mathison was a school counselor. |

# ATTACHMENT (B)

Chronology Regarding Carol Mathison's Treatment of Diane Kourouvacilis

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|---|---|
| 4/13/89<br><br>Kourouvacilis' deposition by General Motors: Kourouvacilis states that she saw Mathison for one to one and a half years and last saw her sometime in 1987 or 1988. | 5/8/89<br><br>Supplemental answers to GM interrogatories, again identifying Mathison as an expert witness. |
| 7/20/89<br><br>Further answers to GM interrogatories identify "Kathleen Mathison" as the person who treated Kourouvacilis for emotional distress. | 8/22/89<br><br>Carol Mathison deposition by General Motors and Avis. Mathison states that she saw Kourouvacilis from 11/4/87 to 6/30/88. Kourouvacilis told her that she sustained no injuries from the fire. Mathison recognized the symptoms of post traumatic stress disorder but did not consider herself qualified to assess the cause of that disorder. Mathison also states that she had not been hired as a witness for Kourouvacilis. |
| 8/31/89<br><br>Respondent files further answers to Avis interrogatories listing Mathison as an expert. | 9/13/89<br><br>Respondent correspondence to Kourouvacilis about Mathison's testimony. Respondent asks Kourouvacilis to document her physical injuries from the 1985 fire, stating that, "No one else seems to remember [any physical injury]". |

# ATTACHMENT (C)

Chronology Regarding Lt. Colburn

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|---|---|
| 11/1/85<br><br>1985 fire. | 5/21/88<br><br>Respondent receives Lt. Colburn's report. |
| 6/2/88<br><br>Respondent correspondence to Lt. Colburn, asking how it is that Lt. Colburn determined that the fire was electrical and whether Lt. Colburn thought that the fire was due to a defect in the Monte Carlo. | 6/15/88<br><br>Lt. Colburn leaves a message with Respondent's office that he does not remember the fire. |
| 8/10/88<br><br>Respondent sends Lt. Colburn's report to General Motors. | 12/5/88<br><br>Respondent sends Lt. Colburn's report to Avis. |

# ATTACHMENT (C)

Chronology Regarding Lt. Colburn

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|---|---|
| 6/26/89<br><br>Respondent prepares a statement for Lt. Colburn's signature without having spoken to Lt. Colburn about its content. The statement provides in part that, "It is my opinion that the cause of the fire was due to defective wiring under the hood, which wiring was defective at the time the car was manufacnured . . . I know the cause of the fire was in the wiring under the hood from my examination of the wiring and the damage to the car. I know from the type of fire damage in the wiring that it was due to defective wiring which was defective when it was installed by the manufacturer". Respondent forwards this statement to Kourouvacilis asking that she obtain the fire marshal's signature with whatever additions or corrections are needed in order for him to sign the statement. The statement is never signed and returned. | 7/20/89<br><br>Respondent provides further answers to GM interrogatories, indicating that Kourouvacilis was informed by the fire marshal that the cause of the fire was defective wiring. |
| 7/31/89<br><br>Respondent provides answers to Avis interrogatories, attaching a copy of Lt. Colburn's report and indicating that Lt. Colburn is the source of evidence that an unspecified short circuit caused the fire due to defective wiring. | 8/31/89<br><br>Respondent provides further answers to Avis interrogatories stating that Lt. Colburn is expected to testify to defective wiring at the time of manufacture (Respondent has not spoken directly to Lt. Colburn, knows that Lt. Colburn does not remember the fire and has not had his prepared statement returned to him. |

# ATTACHMENT (C)

Chronology Regarding Lt. Colburn

| 9/13/89 | 9/18/89 |
| --- | --- |
| Respondent correspondence to Kourouvacilis informing her that the deposition of Lt. Colburn was postponed but will be rescheduled and asking that Kourouvacilis obtain a statement from Lt. Colburn that, "The fire was due to a defect in the manufacture of the wiring. Please obtain a statement from Mr. Corbin so that we will know if he will so testify". | Lt. Colburn signs a sworn affidavit on behalf of General Motors, indicating that he was never the fire marshal, that he has no memory of the Monte Carlo or Kourouvacilis, that entries on the report were "purely guesses" and that he had previously informed Kourouvacilis that he did not know the cause of the fire. |

# ATTACHMENT (D)

Chronology Regarding Grzebien

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|---|---|
| 11/1/85<br><br>1985 fire. | 3/13/89<br><br>Respondent correspondence to Kourouvacilis asking her to obtain statements from mechanics regarding the cause of the fire. |
| 3/23/89<br><br>Kourouvacilis message left at Respondent's office indicating that, "Her mechanic does only front-end work and suspension but is willing to help you if you need. Does not do wiring." | 3/28/89<br><br>Kourouvacilis provides Respondent with her draft of a statement for "Grez". The statement indicates that Grzebien does not do wiring or electrical repairs and that he was informed by Kourouvacilis that the fire marshal stated that the fire was due to defective wiring installed at the GMC factory. |
| 4/10/89<br><br>Respondent correspondence to Kourouvacilis enclosing a typed statement for Grzebien's signature. Respondent had modified the statement provided to him by Kourouvacilis so as to eliminate Grzebien's statement that he does not do wiring or electrical repairs and inserted in its place that, "Based on my experience and training and the above facts, it is my opinion that her under the hood fire of October 31, 1985 was due to defective wiring which had been installed by General Motor in its factory when the car was made". | 4/13/89<br><br>Kourouvacilis returns the Respondent-prepared statement signed by Grzebien. |

# ATTACHMENT (D)

Chronology Regarding Grzebien

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|---|---|
| 5/8/89<br><br>Respondent provides supplemental answers to GM interrogatories listing Grzebien as an expert as to the cause of the fire. | 7/26/89<br><br>Grzebien deposition by General Motors and Avis. Grzebien testifies that he does not do electrical work, did not know the cause of the fire and had not told Kourouvacilis or the Respondent that he would be an expert witness in the case. Respondent did not attend this deposition. |
| 7/31/89<br><br>Respondent provides answers to Avis interrogatories indicating that Grzebien told Kourouvacilis that the fire was caused by defective wiring. | 8/7/89<br><br>Grzebien telephones the Respondent and complains to the Respondent that it was "ridiculous" that he be called as a witness in connection with this case. This is the first direct conversation between the Respondent and Grzebien. |
| 8/31/89<br><br>Respondent provides further answers to Avis interrogatories, again listing Grzebien as an expert witness as to the cause of the fire. | 9/15/89<br><br>Respondent receives copy of Grzebien's deposition of 7/26/89. |

# ATTACHMENT (D)

Chronology Regarding Grzebien

| | |
|---|---|
| 9/18/89<br><br>Respondent correspondence to Kourouvacilis, informing Kourouvacilis that Mr. Grzebien, at his deposition, "stated that he had no idea as to the cause of your fire. It is not helpful to have misinformation in your sworn interrogatory answers and your sworn deposition . . . I did speak to Grzebien and he may be of assistance based upon hypothetical questions perhaps. He stated that repair work had been done by Edward Pessolano of LTD Motors on State Street for your 1983 accident, I suggest you get a statement from that company and Mr. Pessolano if you can". | 10/10/89<br><br>Hearing on motion for summary judgment. Respondent submits the unsworn statement of Grzebien which the Respondent had drafted on 4/10/89 and received on 4/13/89 (This statement is not accepted by the Court since it is not signed under the pains and penalties of perjury). |
| 10/13/89<br><br>Respondent visits Grzebien at his garage to have Grzebien swear to the earlier statement and to notarize his signature. When Grzebien balks at executing this statement as is, the Respondent adds the word "probably" prior to the opinion as to cause and obtains Grzebien's signature which the Respondent notarizes. This statement is filed with the Court in opposition to the motion for summary judgment. | 11/1/89<br><br>Summary judgment is granted in favor of General Motors and Avis (Grzebien's statement is not accepted or considered by the Court since it was not filed timely). |

# ATTACHMENT (E)

Chronology Regarding Employment

| | |
|---|---|
| 7/26/83<br><br>1983 accident with Towne. | 8/6/84<br><br>Kourouvacilis discharged from Monson State Hospital. |
| 11/1/85<br><br>1985 fire. | 11/20/85<br><br>Respondent retained regarding 1985 fire. Kourouvacilis says nothing in intake interview regarding lost wages. |
| 5/86<br><br>Kourouvacilis employed at Admail as clerical person. | 6/9/83 to 6/12/86<br><br>Kourouvacilis employed at United Technologies/Hamilton Standard. |
| 8/31/87<br><br>Kourouvacilis provides Respondent with application for unemployment compensation filed on 8/10/85, in which she states she is able and available for full-time suitable work. | 11/24/87<br><br>Respondent agrees to represent Kourouvacilis on a contingent-fee basis in the Monson case. |
| 12/1/87<br><br>Complaint filed by Respondent in the Monson case. In the Complaint, it is alleged that Kourouvacilis was without work from October 1984 through June 1986. | 3/2/89<br><br>Respondent provides answers to GM interrogatories in which Kourouvacilis claims two weeks of lost wages in 1985 from "Adral Co." and claims that she lost this job because of her absence due to the 1985 fire. |

# ATTACHMENT (E)

Chronology Regarding Employment

| | |
|---|---|
| 4/13/89<br><br>Deposition of Kourouvacilis in which she testifies that she worked for "Admil" in 1985 through the Agentry Temporary Services. | 4/20/89<br><br>Respondent receives Kourouvacilis' tax records for 1984, 1986, 1987 and 1988 which he forwards to the attorney for Avis. The tax returns show employment during the following times:<br>1984--two W2's from the Commonwealth of Massachusetts totalling $6,514.42<br>1985--no return<br>1986--total income of $1,481<br>1987--employment with Kelly Services totalling $2,538.63; Milton Bradley totalling $353.56; Sandi, Inc. d/b/a Merry Maids totalling $167; |
| 4/20/89 (continued)<br><br>1987--(cont.) the Agentry of Springfield totalling $1,625; and J.B. Riverfront, Inc. totalling $704.77<br>1988--employment with Joseph; Rosatti totalling $3,360; James Farrell, C.P.A. totalling $757.58; and Movie Shops Super Stores, Inc. totalling $431.80<br>1989--employment with Avalon Realty of Western Mass. totalling $1,648.50; Creative Chemicals, Inc. totalling $368; Joseph Rosatti totalling $1,400; The Agentry Group<br>1989--totalling $769.13; and the Commonwealth of Massachusetts, Department of Employment and Training $1,677 | 5/2/89<br><br>Respondent received Kourouvacilis' resume which shows no employment from July 1983 through January 1987 and which otherwise reflects employment as follows:<br><br>5/88-1/89 office manager with Joseph Rosatti, Inc.<br>1/88-3/88 computer/bookkeeping for James F. Farrell, C.P.A.<br>1/87-9/87 data entry/word processing |

# ATTACHMENT (E)

Chronology Regarding Employment

| | |
|---|---|
| 5/15/89<br><br>Respondent files interrogatory answers in the Monson case claiming that Kourouvacilis was unemployed from 1983 through 1987 and stating that Kourouvacilis was being treated by Dr. Metz and Mathison and was unable to work due to migraine headaches and affliction of emotional distress due to wrongful termination at Monson. | 7/28/89<br><br>Respondent provides further answers to GM interrogatories claiming employment at data entry/word processing in 1985 as her only employment. |
| 7/31/89<br><br>Respondent provides answers to Avis interrogatories claiming lost wages "since the fire attributable in part to emotional distress". | 8/31/89<br><br>Respondent provides further answers to Avis interrogatories stating that Kourouvacilis had no employment for two years after the accident due to anxiety and emotional distress, "arising from the fire in the car sold to me by Avis" and claiming lost earning capacity for these two years of $36,000. |
| 3/12/91<br><br>Respondent speaks to AFSCME counsel, Wayne Soini about potential back pay if Kourouvacilis were reinstated, position taken that Kourouvacilis was ready, willing and able to work but unable to find employment from 1984 through 1991. | |

# DIANE KOUROUVACILIS *vs.* GENERAL MOTORS CORPORATION & another[1].

Hampden, February 4, 1991 - July 23, 1991.

PRESENT: LIACOS, C.J., WILKINS, NOLAN, LYNCH & O'CONNOR, JJ.

*Negligence*, Manufacturer of motor vehicle, Seller of used goods. *Warranty*. *Practice, Civil*, Summary judgment, Appeal.

In a civil action the plaintiff's claim for treble damages against one defendant pursuant to G.L. c. 231, §85J, for the sale of personal property by deceit or fraud, was properly dismissed for failure to state a cause of action under the statute, where the complaint alleged that another party was the seller of the property in question. [708]

A party in a civil action moving for summary judgment on a claim in which the opposing party will have the burden of proof at trial is entitled to summary judgment if it demonstrates, by reference to materials described in Mass. R. Civ. P. 56(c), unmet by countervailing material, that the opposing party has no reasonable expectation of proving an essential element of that party's case. [708-716]

In a civil action the defendants' motions for summary judgment were properly allowed on the plaintiff's claims for breach of warranty, negligence, deceit, and violation of G. L. C. 93A, arising from the plaintiff's purchase of an automobile that caught fire allegedly due to a manufacturing or design defect in its electrical system, where the defendants demonstrated that the plaintiff would not be able to prove that the alleged wiring defect existed when the defendants, the automobile's manufacturer and seller, last had possession of the vehicle. [716-717]

CIVIL ACTION commenced in the Superior Court Department on October 27, 1988.

A motion to dismiss was heard by *George C. Keady, Jr.*, J., and motions for summary judgment were heard by *Constance M. Sweeney*, J., and *Daniel A. Ford*, J., respectively.

[1] Avis Rent-A-Car.

The Supreme Judicial court on its own initiative transferred the case from the case from the Appeals Court.

*Louis Kerlinsky* for the plaintiff.

*John W. Gibbons* for General Motors Corporation.

*Thomas J. Donoghue* for Avis Rent-A-Car.

O'CONNOR, J. This is the plaintiff's appeal from a judgment dismissing in its entirety the plaintiff's complaint asserting claims against two defendants based on numerous theories of product liability. In six counts, the complaint alleges the liability of General Motors Corporation (General Motors) based on breach of warranty, negligence (two counts), deceit, violation of G. L. C.93A, § 2 (1990 ed.), and violation of G. L. c. 231, § 85J (1990 ed.). In four other counts, the plaintiff asserts the liability of Avis Rent-A-Car (Avis) for breach of warranty, negligence, and violation of both c. 93A, § 2, and c. 231, § 85J. The several allegations arise out of the plaintiff's purchase of a 1979 Monte Carlo sedan automobile from Avis in 1979, which vehicle, a General Motors product, caught fire and was destroyed in 1985. The fire is alleged to have been due to a manufacturing or design defect in the vehicle's electrical system. The plaintiff asserts that, as a result, she sustained personal injury and loss of the automobile.

A judge in the Superior Court allowed General Motors's motion to dismiss the count alleging its violation of c. 231, § 85J, for failure to state a claim. Mass. R. Civ. P. 12 (b) (6), 365 Mass. 754 (1974). Following discover, another judge allowed Avis's motion for summary judgment on the counts alleging Avis's negligence and its violation of c. 93A, § 2, and c. 231, § 85J. Those counts, too, were dismissed. At that point the only remaining count against Avis asserted breach of warranty. Subsequently, a third judge allowed motions for summary judgment in both defendants' favor with respect to the remaining counts. The judge explained his reasoning in a memorandum accompanying his decision and order. The plaintiff appealed, and we transferred the case from the Appeals Court here on our own initiative. We now affirm the judgment entered in the Superior Court.

General Laws c. 231, § 85J (1990 ed.), provides, "Whoever, by deceit or fraud, sells personal property shall be liable in tort to a purchaser in treble the amount of damages sustained by him." Section 85J "creates a cause of action for a purchaser of personal property against the seller of that property." *Margaret Hall Found. v. Atlantic Fin. Management, Inc.*, 572 F. Supp. 1475, 1483 (D. Mass. 1983). A purchaser-seller relationship between the plaintiff and the defendant is necessary. *Id.* No such relationship between the plaintiff and General Motors is alleged in this case. Rather, the complaint alleges that the plaintiff purchased the automobile from Avis. Therefore, the judge correctly ruled that the complaint failed to state a cause of action under c. 231, § 85J, against General Motors.

With respect to the remaining counts, all of which were dismissed on summary judgment, the plaintiff would be unable to prevail against either defendant at trial without proving that the alleged defect in the wiring was present when that defendant last had possession of the vehicle. *Smith v. Ariens Co.*, 375 Mass. 620, 626 (1978). See *Fernandes v. Union Bookbinding Co.*, 400 Mass. 27, 37-38 (1987); *Cocco v. Deluxe Sys., Inc.*, 25 Mass. App. Ct. 151, 153-154 (1987); *Walsh v. Atamian Motors, Inc.*, 10 Mass. App. Ct. 828, 829 (1980). The defendants propounded interrogatories to the plaintiff inquiring, among other thins, about the testimony by which, and the identity of expert witnesses by whom the plaintiff expected to sustain that burden of proof. Initially, the plaintiff's answers were unresponsive. Finally, in supplemental and further answers, the plaintiff stated her intention to call "Walter Grez" and "Lt. Colburn, Fire Marshall" as experts "to testify that the cause of the fire was defective wiring present at the time the car was manufactured." Along with her answers, the plaintiff submitted a copy of a report, issued by the Springfield fire department and purportedly made out by "E. Colburn Lieut.," which indicates that the fire was caused by an "unspecified short circuit" involving "electrical failure" and igniting "electrical wire." No other anticipated testimony or witness was revealed.

The defendants did not support their motions for summary judgment with affidavits or other materials showing that the fire was not caused by wiring that was defective when the plaintiff took possession of the vehicle from Avis. Instead, the defendants supported their motions by the sworn deposition of Walter Grzebien, the owner of Grez Automotive, and an affidavit of Lieutenant Eugene Colburn, a firefighter employed by the Springfield fire department at the time of the fire.

In his deposition, given in July, 1989, approximately four years after the fire, Grzebien testified that he had first met the plaintiff about two months prior to giving the deposition. At that time, the plaintiff came into Grez Automotive and asked him about some work she said Grez Automotive had done on her automobile following a 1982 or 1983 collision in which the vehicle had been involved. Grzebien testified that he had no memory of working on the vehicle. He also testified that the plaintiff told him that her automobile had burned and she wanted to find out what caused the fire. During the deposition, the following exchange between defense counsel and Grzebien occurred:

Q.: "As you sit her today do you have any recollection of the condition of her car which was a 1979 Chevrolet Monte Carlo....?

A.: "No."

.....

Q.: "Have you been retained by [the plaintiff] or her lawyer as an expert witness in this case?"

A.: "No."

Q.: "Do you have any knowledge as to what caused the fire?"

A.: "No, I don't."

Q.: "Did you tell [the plaintiff] that you had no knowledge about what caused the fire?"

A.: "Yes, I did."

.....

Q.: " You have no idea what caused the fire, if anything?"

A.: "No."

Q.: "You have not been retained as a witness by [the plaintiff]?"
A.: "No."
Q.: "Has [the plaintiff] mention[ed] her lawyer or has her lawyer ever contacted you?"
A.: "No, he has not."
Q.: "Did [the plaintiff] tell you at any time that you were going to be an expert witness on her behalf?"
A.: "No, she didn't."
Q.: "Do you consider yourself to be an expert witness in this case?"
A.: "No, I don't."

In his affidavit, Colburn stated that he was a firefighter employed by the Springfield fire department holding the rank of lieutenant, that he had never been a fire marshal, and that he was the officer in charge of the truck that responded to the fire involving the plaintiff's motor vehicle and he prepared the official incident report. In that report, he said, he "listed unspecified short circuit under 'Form of Heat of Ignition,' electrical wire under 'Form of Material Ignited' and electrical failure under 'Ignition Factor.' However, those were purely guesses on my part because I did not examine the vehicle to determine the cause of the fire. I do not know what caused the fire. I have no knowledge or information with regard to the condition of the vehicle before the fire and I have absolutely no information or knowledge about any alleged defect in the vehicle or that anything about the vehicle caused the fire." In addition, Colburn swore that he had told the plaintiff all those things.

The plaintiff's only timely response to Grzebien's deposition and Colburn's affidavit was her own affidavit denying that Colburn had told her he was "guessing" when he completed and filed his report. In addition, the plaintiff attached to her affidavit a document that she characterized as "[a] copy of the sworn statement of Mr. Grzebien" purporting to state Grzebien's opinion that the fire was caused by defective wiring which was present when the automobile was manufactured. The motion judge properly refused to consider

Grzebien's alleged statement because it was not in affidavit form. See *O'brion, Russell & Co., v. LeMay*, 370 Mass. 243, 245 (1976). Also, three days after the motion hearing, the plaintiff filed a duplicate of the alleged Grzebien statement, this time purportedly signed by Grzebien under the pains and penalties of perjury. The judge disregarded that document as well for the reason that it was filed late. The judge's action in that regard was proper. Rule 56 (c) of the Massachusetts Rules of Civil Procedure, 365 Mass. 824 (1974), provides that a party resisting summary judgment "prior to [not three days after] the day of hearing may serve opposing affidavits." See *LoCicero v. Hartford Ins. Group*, 25 Mass. App. Ct. 339, 341 n.2 (1988).

In arriving at the conclusion that the defendants were entitled to summary judgment, the motion judge reasoned as follows: "In moving for summary judgment, the defendants have the burden of affirmatively demonstrating that there is no genuine issue of fact on every relevant issue raised by the pleadings. *Mathers v. Midland-Ross Corp.*, 403 Mass. 688, 690 (1989). The burden on the moving party may be discharged by showing that there is an absence of evidence to support the non-moving party's case. *Celotex Corp. V. Catrett*. 477 U.S. 317, 322 (1986). A complete failure of proof concerning an essential element of the non-moving party's case renders all other facts immaterial. *Id.* At 323. I rule that the defendants have met their burden by submission of the affidavit of Lt. Colburn and the sworn deposition testimony of Mr. Grzebien. In effect, they have affirmatively demonstrated the complete failure of proof concerning an essential element of the plaintiff's claim, namely the existence of a defect in the vehicle at the time of purchase."

"One the defendants met their burden, 'the burden shifted to the plaintiff to show with admissible evidence the existence of a dispute as to material facts.' *Godbout v.Cousens*, 396 Mass. 254, 261 (1985). The plaintiff has not satisfied that burden. Her response to the defendants' motions is woefully inadequate, and indicates that she has absolutely no competent evidence that the vehicle was defective

when purchased or that any such alleged defect was the proximate cause of her damages. The plaintiff's failure to make the required responsive showing is fatal. See *Mathers v. Midland-Ross Corp.*, *supra* at 690-691." (Footnote omitted.)

We are in substantial agreement not only with the result reached by the motion judge but also with his reasoning. As we have previously observed, we are not bound to apply the summary judgment standard articulated by the United States Supreme Court in *Celotex Corp. v. Catrett*, *supra*. *King v. Globe Newspaper Co.*, 400 Mass. 705, 719 (1987), cert. denied, 485 U.S. 940 & 962 (1988). However, we think it makes eminent good sense to do so. In *Celotex Corp.*, the United States District Court for the District of Columbia had granted summary judgment to Celotex Corporation (Celotex) in an action for wrongful death brought by Catrett because Catrett "was unable to produce evidence in support of her allegations . . . that the decedent had been exposed to [Celotex's] asbestos products." *Id.* At 319. The Court of Appeals for the District of Columbia Circuit reverse, holding that the failure of Celotex, the moving party, " to support its motion with evidence tending to *negate* such exposure precluded the entry of summary judgment in [Celotex Corp.'s] favor" (emphasis in original). *Id.* The Supreme Court reversed the decision of the Circuit Court.

In that case, Celotex, which was the defendant and moving party in the trial court, relied on the fact that, in answering interrogatories specifically requesting such information, the plaintiff, Catrett, failed to identify any witnesses who could testify about the decedent's exposure to Celotex's asbestos products. In response, Catrett produced three documents which she contended showed such exposure. Celotex argued that the documents constituted inadmissible hearsay and thus could not be considered. *Id.* at 320. In reversing the trial court's allowance of the summary judgment motion, the Court of Appeals reasoned that the motion was fatally defective because Celotex had not supported its motion with any affirmative evidence of the deceased's non-exposure to its

products in the form of affidavits or otherwise. The result, the Court of Appeals concluded, was that Catrett had no burden to respond, and therefore it made no difference whether the three documents produced by Catrett constituted inadmissible hearsay. *Id.* at 321-322.

In reversing the Court of Appeals, the Supreme Court reasoned that, while a party seeking summary judgment must identify for the court the materials referred to in Fed. R. Civ. P. 56 (c), that is, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," on which the party relies, there is "no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim" (emphasis in original). *Id.* at 323.[2] The Court said: "[R]egardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied. One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose. . . . In cases like the instant one, where [as here] the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the 'pleadings, depositions, answers to interrogatories, and admissions on file.' Such a

[2] Rule 56 (c) of the Federal Rules of Civil Procedure is identical with the relevant portion of Mass. R. Civ. P. 56 (c), and is as follows: "The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

motion, whether or not accompanied by affidavits, will be 'made and supported as provided in this rule,' and Rule 56(e) therefore requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" (Footnote omitted." *Id.* at 323-324.

The Supreme Court made clear that a party who moves for summary judgment has the burden of initially showing that there is an absence of evidence to support the case of the nonmoving party shouldering the burden of proof at trial. That burden is not sustained by the mere fining of the summary judgment motion or by the filing of a motion together with a statement that the other party has produced no evidence that would prove a particular necessary element of this case. The motion must be supported by one or more of the materials listed in rule 56 (c) and, although that supporting material need not negate, that is, disprove, an essential element of the claim of the party on whom the burden of proof at trial will rest, it must demonstrate that proof of that element at trial is unlikely to be forthcoming. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 328 (1986) (White, J., concurring) ("But the movant must discharge the burden the Rules place upon him: It is not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff has no evidence to prove his case").

The Supreme Court concluded that, by pointing out the failure of the plaintiff to identify any witness who was expected to testify regarding the deceased's exposure to Celotex's product in response to interrogatories specifically requesting such information, Celotex had demonstrated that, unless the plaintiff could produce countervailing materials, there was no genuine issue of material fact and Celotex was entitled to judgment in its favor. Then, rather than rule on the adequacy of the three documents the plaintiff has submitted as "countervailing materials," that is, to show that the plaintiff was in position to prove her case at trial despite

her failure to identify witnesses in response to interrogatories, the Court remanded the case to the Court of Appeals to consider that question in the light of local law. *Id.* at 327.

*Celotex Corp. v. Catrett, supra*, was a five-to-four decision, but at least three of the dissenters agreed with the Court's analysis of Fed. R. Civ. P. 56. Writing in dissent, Justice Brennan, joined by Chief Justice Burger and Justice Blackmun, discussed rule 56 at length. We quote a small but relevant part of that discussion as follows: "If the burden of persuasion at trial would be on the nonmoving party, the party moving for summary judgment may satisfy Rule 56's burden of production in two ways. First, the moving party may submit affirmative evidence that negates an essential element of the nonmoving party's claim. Second, the moving party may demonstrate to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim. . . . If the nonmoving party cannot muster sufficient evidence to make out its claim, a trial would be useless and the moving party is entitled to summary judgement as a matter of law. . . . Plainly, a conclusory assertion that the nonmoving party has no evidence is insufficient. See *ante* at 328 (White, J., concurring). Such a 'burden' of production is no burden at all and would simply permit summary judgment procedure to be converted into a tool for harassment. . . . Rather, as the Court confirms, a party who moves for summary judgment on the ground that the nonmoving party has no evidence must affirmatively show the absence in the record." (Citations omitted.) *Id.* at 331-332 (Brennan, J., dissenting).

Shortly after the Massachusetts Rules of Civil Procedure became effective on July 1, 1974, we commented as follows: "We view Rule 56 as a welcome, progressive addition to judicial procedure in this Commonwealth. 'It creates an excellent device to make possible the prompt deposition of controversies on their merits without a trial, if in essence there is no real dispute as to the salient facts of if only a question of law is involved.' 3 W.W. Barron & A. Holtzoff, Federal Practice and Procedure (Rules ed.) §11231,

at 96 (Wright rev. ed. 1958). See 10 C.A. Wright & A.R. Miller, Federal Practice and Procedure § 2712, at 370 (1973)." *Community Nat'l Bank v. Dawes*, 369 Mass. 550, 553 (1976). We agree with the Supreme Court's statement in *Celotex Corp. v. Catrett, supra* at 327, that "Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis." Therefore, we also agree that a party moving for summary judgment in a case in which the opposing party will have the burden of proof at trail is entitled to summary judgment if he demonstrates, by reference to material described in Mass. R. Civ. P. 56 (c), unmet by countervailing materials, that the party opposing the motion has no reasonable expectation of proving an essential element of that party's case. To be successful, a moving party need not submit affirmative evidence to negate one or more elements of the other party's claim.

The defendants made such a demonstration in this case. The plaintiff had the burden of proof at trial on the question whether her alleged personal injury and property loss were due to a defect in the manufacture or design of her automobile. In support of their motions for summary judgment, the defendants showed through answers to interrogatories that the plaintiff was relying on certain witnesses and testimony to sustain her burden of proof. The defendants also showed, by means of a deposition of one of those witnesses and an affidavit of the other, that the plaintiff's reliance was unjustified, and that therefore there was no genuine issue of material fact and the defendants were entitled to judgment in their favor. That showing having been made, the plaintiff was required to respond by "set[ting] forth specific facts showing that there is a genuine issue for trial." Mass. R. Civ. P. 56 (c). As a result of the plaintiff's failure in this regard, the grant of summary judgment to the defendants was appropriate.

Nothing in *Hopper v. Callahan*, 408 Mass. 621 (1990), on which the plaintiff relies, requires or suggests a different result. Furthermore, there is no merit to the plaintiff's argument that, even without expert testimony, she can prove her case by invoking the doctrine of res ipsa loquitur. The common experience of mankind in no way suggests that an unexplained fire in an automobile six years after its purchase was caused by a defect in the vehicle that had existed from the time of the vehicle's manufacture or sale. See Restatement (Second) of Torts § 328D comment d (1965).

The defendants characterize the plaintiff's appeal as "frivolous" and ask for damages pursuant to Mass. R. App. P. 25, as amended, 378 Mass. 9225 (1979). See *Glorioso v. Retirement Bd. of Wellesley*, 401 Mass. 648, 652 (1988). We agree that much of the plaintiff's appellate argument is without merit. However, the central issue was whether we would adopt the rule laid down in *Celotex Corp. v. Catrett*, *supra*, a question to which we have previously alluded but, until today, have not answered. In those circumstances, it would not be appropriate for us to deem this appeal frivolous. We decline to award damages pursuant to rule 2.

*Judgment affirmed.*

COMMONWEALTH OF MASSACHUSETTS
BOARD OF BAR OVERSEERS
OF THE SUPREME JUDICIAL COURT

| | | |
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| BAR COUNSEL,<br>Petitioner | ) | |
| v. | ) | BBO File: C6-91-0124 |
| LOUIS KERLINSKY,<br>Respondent | ) | |

## SUPPLEMENTAL FINDINGS AND REPORT OF HEARING COMMITTEE

This matter came before the Hearing Committee upon remand by order of an Appeal Panel of the Board of Bar Overseers forwarded to the Hearing Committee on July 30, 1996. The Appeal Panel requests the Hearing Committee to qualify its findings and rulings. The Hearing Committee, after deliberation and review of the existing record before it, makes the following findings in response to the numbered requests of the Appeal Panel:

1. Whether or not the respondent's conduct, which the Hearing Committee ruled was in violation of the provisions of DR 7-101(A)(1), (2), and (3), as set forth in the report of the Hearing Committee, was intentional, and to clarify and/or make findings in support of the Hearing Committee's determination of whether the respondent acted intentionally or not.

FINDINGS:

In its findings, the Hearing Committee found various acts and omissions of the respondent to constitute violations of DR 7-101 (A) (1), (2), and (3). See Report pp 27-29. The committee finds that respondent did not have the purpose of failing to seek the lawful objectives of his client, failing to carry out his contract of employment, or prejudicing his client. The committee finds,

however, that the acts and omissions of the respondent were themselves intentional. These acts and omissions constituted a failure to seek the lawful objectives of respondent's client and a failure to carry out his contract of employment with his client. Prejudice and damage to the client was the foreseeable and direct result and effect of these intentional acts and omissions. The committee, therefore, finds that the respondent's violations of DR 7-101(A)(1), (2), and (3) were intentional.

2. Whether or not the respondent's conduct, which the Hearing Committee rules was in violation of DR 7-102 (A)(2) and (7), as set forth in the report of the committee, was done knowingly, and to clarify and/or make findings in support of the Hearing Committee's determination of whether the respondent acted knowingly or not.

FINDINGS:

The committee found that the respondent violated DR 7-102(A) (2) not only because he advanced a claim with "absolutely no competent evidence" as to liability, but also because he advanced the claim with "no reasonable belief that a claim for personal injuries could be supported by any medical opinion". "He never had evidence of damages." See Report pp 29, 30.

The committee finds that respondent knew he had no competent evidence of personal injury damages, even if he somehow thought he didn't need evidence as to the cause of the fire. His violation of DR 7-102 (A) (2) was a knowing violation.

3. As the Hearing Committee made no ruling on the alleged violation of DR 7-102 (A) (5), whether or not the respondent knowingly violated this provision and to make appropriate findings in support of its rulings on this allegation.

FINDINGS:

The committee does not find that the respondent himself made any knowing misstatements of law or fact. But see findings

relative to DR 7-102 (7), Report pp 30, 31. His violation of DR 7-102 (7) was a knowing violation.

On August 5, 1996 respondent filed a motion for the recusal of Hearing Committee Member, Michael E. MacDonald, Esquire. Although member MacDonald found himself to be impartial, he nevertheless voluntarily recused himself. Such recusal took place before any discussion, deliberation or other action by the Hearing Committee pursuant to the order of the Appeal Panel, and Mr. MacDonald took no part in such proceedings.

Date: August 19, 1996

James P. Rooney /s/
James P. Rooney, Esq., Chair

Date: August 19, 1996

Joel S. Greenberg /s/
Joel S. Greenberg, Esq., Member

**Supreme Judicial Court for the**
**Commonwealth of Massachusetts**
1412 Courthouse, Boston, Mass 02108
(617) 557-1020

Louis Kerlinsky
29 Vanguard Lane
Longmeadow, MA 01106

RE: No. SJC 0726

**IN RE: LOUIS KERLINSKY**

NOTICE OF DENIAL OF PETITION FOR REHEARING

The Petition for Rehearing filed in the above captioned case has been considered by the Court and is denied.

Jean M. Kennett, Clerk

Dated: February 22, 1999

To: Nancy E. Kaufman, Ass't Bar Counsel
Arnold R. Rosenfeld, Bar Counsel
Michael Fredrickson, Boaard Counsel
Louis Kerlinsky
S.J.C. for Suffolk County

APPENDIX D

COMMONWEALTH OF MASSACHUSETTS
BOARD OF BAR OVERSEERS
OF THE SUPREME JUDICIAL COURT

| | |
|---|---|
| BAR COUNSEL, | : |
| Petitioner | : |
| vs. | BBO FILE NO. C6-91-0124 : |
| LOUIS KERLINSKY, ESQ. | : |
| Respondent | : |

## PETITION FOR DISCIPLINE

1. This petition is brought pursuant to the provisions of Chapter Four of the Rules of the Supreme Judicial Court, Rule 4:01, Section 8(2), and Sections 3.13(2) and 3:14 of the Rules of the Board of Bar Overseers.

2. The respondent, Louis Kerlinsky, Esq., was duly admitted to the Bar of the Commonwealth on October 22, 1952.

3. From 1983 to date, the respondent has represented Diane Kourouvacilis in a number of matters. These include, but are not limited to, the following.

a. In or about August 1983, the respondent agreed to represent Diane Kourouvacilis (Kourouvacilis) on a contingent fee basis in a claim for personal injuries and property damage arising fro an accident which had occurred on or about July 26, 1983 (1983 accident). In that accident, another driver, Jerrold Towne (Towne), collided with Kourouvacilis while she was operating her 1979 Chevrolet Monte Carlo (Monte Carlo). The respondent brought suit against Towne in the Hampden Superior Court on June 4, 1984. The *Towne* case was settled in October 1985.

b. On or about August 6, 1984, Kourouvacilis was discharged from her employment at Monson State Hospital for excessive absenteeism. On or about November 24, 1987, the respondent agreed to represent Kourouvacilis on a contingent fee basis on claims arising from Monson's termination of her employment. On December 1, 1987, the respondent filed suit on behalf of Kourouvacilis in the Hampden County Superior Court against the Commonwealth of Massachusetts and Monson State Hospital for wrongful discharge and against AFSCME, Kourouvacilis's union, for allegedly violating its duty of fair representation. *Monson* is still pending.

c. On or about November 1, 1985, Kourouvacilis's Monte Carlo caught fire during operation and was destroyed. On or about November 20, 1985, the respondent agreed to represent Kourouvacilis in return for a contingent fee in a claim for damages against General Motors Corporation (*GM*) and Avis Rent-A-Car (Avis) arising from the car fire.

4. On November 27, 1985, the respondent sent demand letters on Kourouvacilis's behalf pursuant to G.L. ch.93A to General Motors, which had manufactured the Monte Carlo, and to Avis, which had sold the car to Kourouvacilis in Connecticut.

5. The respondent represented in the c. 93A demand letters that Kourouvacilis's car was not safe, that Avis and GM had willfully violated c. 93A and the "Connecticut Consumer Protection Act"; and that Kourouvacilis had sustained damages of $10,000 "because of the severe fright and mental anguish which she suffered as a result of this fire." The respondent relied entirely upon his client's representations and his assumptions about Connecticut law in making these claims against GM and Avis.

6. Between November 1985 and January 8, 1986, the respondent made no effort to preserve the car, to have it inspected by experts, or otherwise to investigate the cause of the car fire. USF&G, Kourouvacilis's insurer, sold the Monte Carlo for salvage on or about January 8, 1986.

7. On October 27, 1988, the respondent filed suit in the Hampden Superior court on behalf of Kourouvacilis against GM

and Avis (*GM* case) raising warranty, negligence, deceit, fraud and c 93A claims arising from the car fire. The complaint alleged, among other things, that the car fire had been caused by a "manufacturing or design defect" which was "present when said vehicle was sold by...GMC." The complaint also alleged that the car fire had been caused by "defective wiring." The respondent relied entirely upon his client in making these claims without any independent investigation or expert advise or opinion and thus had no "good ground" for these claims as required by Mass. R. Civ. P. 11.

8. Commencing in December 1988, GM and Avis served upon the respondent document requests and interrogatories seeking a description of Kourouvacilis's physical injuries, an itemization of her damages, and the identity of expert witnesses expected to testify at trial.

9. In March 1989, the respondent filed Kourouvacilis's first set of answers to GM's interrogatories. The answers falsely represented (a) that Kourouvacilis was under Dr. Lawrence Metz's care for migraine headaches "from smoke inhalation"; (b) that Kourouvacilis had been receiving "care and treatment[ ]" for "over one year" from her college counselor and continued to see her counselor "from time to time"; and (c) that Kourouvacilis had lost her job at "Adral Co." due to a two-week absence caused by the car fire. In fact, Kourouvacilis had never consulted Dr. Metz for headaches after February 1985, and she had not seen her college counselor, Carol Mathison, since June 30, 1988. Kourouvacilis's claims that she had lost her job at "Adral Co." in 1985 due to the car fire directly contradicted her claims in *Monson* that she had been unemployed from August 1984 until sometime in 1986 despite her efforts to secure a job. Nevertheless, the respondent filed Kourouvacilis's answers to the interrogatories either knowing they were false or with reckless disregard for whether or not they were false.

10. Kourouvacilis was deposed by GM and Avis on April 13, 1989. In the respondent's presence, Kourouvacilis falsely testified that the Monte Carlo had operated well after the 1983 accident until the car fire, directly contradicting her prior

deposition testimony in *Towne* that her car had never operated properly after the 1983 accident. Kourouvacilis also falsely testified that her father had taken several photographs of the car after the car fire which had been provided to the respondent and that she had seen Dr. Metz "within a few days" of the fire and had seen him "[a] year ago." The respondent either knew that these representations were false or allowed these representations to stand with reckless disregard for whether or not these claims were true or false. The respondent did not call upon his client to correct these representations, and he did not withdraw from representation when the statements were not corrected.

11. On May 8, 1989, the respondent filed supplemental answers to GM's interrogatories. These supplemental answers again identified Dr. Metz and Carol Mathison as expert witnesses regarding her alleged injuries and identified "Walter Grez" as her expert on the cause of the fire. The respondent knew when he filed the May 8, 1989, supplemental answers that none of the identified experts had been retained in the case and that neither Dr. Metz nor Carol Mathison had expressed an expert opinion that the car fire had caused Kourouvacilis's injuries. The respondent also had never communicated with Walter "Grez", whose true name is Walter Grzebien, and thus had no reasonable basis for filing interrogatory answers which identified Grzebien as an expert for Kourouvacilis.

12. On August 31, 1989, the respondent filed answers to interrogatories propounded by Avis. The interrogatories falsely identified Walter "Grez"; "Lt. Colburn, Fire Marshall"; Dr. Metz; and Carol "Mathison" as the plaintiff's experts. The respondent then knew that he had neither consulted nor retained these or any other persons as experts and that he had never received an expert opinion from these persons or any qualified expert identifying any defect in the car as the cause of the fire or identifying the car fire as the cause of Kourouvacilis's alleged physical problems.

13. The August 31, 1989, interrogatory answers also falsely represented that Kourouvacilis had sustained $36,000 in lost earnings due to her unemployment "for approximately 2

years after the [car fire] because of the an[xie]ty, emotional distress and post traumatic stress disorder...." At the same time, the respondent was claiming on behalf of Kourouvacilis in the *Monson* case that she had been available for and had actively sought employment in 1985 and 1986.

14. In September 1989, GM and Avis filed motions for summary judgment and for sanctions and other relief on the grounds, *inter alia*, that the plaintiff was unable to demonstrate that any defect in the car caused the fire or that her alleged injuries were caused by the car fire. In support of the motion, GM attached:

a. a sworn affidavit signed by Lieut. Eugene Colburn that he was not a fire marshal, had not been retained as an expert, had no recollection of the car, and had no opinion on the cause of the fire;

b. the deposition testimony of Walter Grzebien that he had not seen the car after the fire, had no opinion on the cause of the car fire, and had not been retained as an expert;

c. the deposition testimony of Dr. Metz that he had not seen Kourouvacilis since January 1985 and had no knowledge of any medical problems after that date; and

d. the deposition testimony of Carol Mathison that Kourouvacilis had told her she had not been injured in the car fire and that Ms. Mathison was not qualified to render a medical opinion on the cause of Kourouvacilis's post-traumatic stress disorder.

15. The respondent opposed the motion for summary judgment without consulting or communicating with Grzebien, Metz, Mathison, or Colburn. In support of his opposition, the respondent filed an affidavit, signed by Kourouvacilis under the penalties of perjury, in which she falsely represented that she had been treated by Dr. Metz after the fire in October 1985 and that she had "bills from him for treatment in 1986." The respondent filed this affidavit knowing that it was false or with reckless disregard for whether or not the affidavit was false.

16. The respondent also filed as part of his opposition an unsworn statement of "_____ Gerz" ("Gerz"

statement) which he had drafted based solely on information obtained from his client and which his client had taken to Walter Grzebien on April 13, 1989, to be signed. The statement asserted:

> Based on my experience and training and the above facts, it is my opinion that her under-the-hood fire of October 31, 1985 was due to defective wiring which had been installed by General Motors in its factory when the car was made.

Because the "Gerz" statement was not signed under the pains and penalties of perjury, it did not satisfy the requirements of Mass. R. Civ. P. 56 and was therefore disregarded by the judge considering the motions for summary judgment.

17. After the hearing on the motion for summary judgment, the respondent approached Grzebien to have him sign the same statement under oath. The respondent did not tell Grzebien that his statement would be offered as an expert opinion on the cause of the car fire, and he did not ask Grzebien whether or not he had an expert opinion on the cause of the car fire. In fact, Grzebien did not consider himself an expert and did not have an expert opinion on the cause of the fire. Grzebien signed the statement after the respondent inserted the word "probably" before the words "due to defective wiring" to ally Grzebien's concerns that he did not know the cause of the fire. The respondent notarized Grzebien's signature and filed the statement with the court disregarded the notarized statement because it was not timely filed.

18. On November 1, 1989, the Hampden Superior Court granted the defendant's motion for summary judgment on the ground that the plaintiff could not prove that a defect existed in the car at the time of purchase which caused the car fire.

19. The respondent continued to pursue Kourouvacilis's case against GM and Avis after the trial court granted summary judgment even though he had no good faith basis for continuing to prosecute the case. He filed a motion for reconsideration and eventually appealed the case, which was

transferred to the Supreme Judicial Court on its own motion. The Supreme Judicial Court upheld the trial court's order in *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706 (1991). The Court's decision is attached hereto and incorporated herein as Attachment A.

20. The respondent's failure to have Kourouvacilis's automobile inspected after the car fire, his failure to consult any person reasonably qualified to render an expert opinion on the cause of the fire or on the cause of Kourouvacilis's alleged injuries, and his failure to produce documentation required to oppose the defendants' motion for summary judgment in the *GM* case constituted a violation of Canon Six, Disciplinary Rule 6-101(A)(3), and Canon Seven, Disciplinary Rules 7-101(A)(1), (2) and (3), as set forth in paragraph 23.

21. The respondent's filing of pleadings in the *GM* case without good ground for support constituted a violation of Mass. Rule Civ. P. 11; Canon One, Disciplinary Rules 1-102(A)(5) and (6); and Canon Seven, Disciplinary Rule 7-102(A)(2), as set forth in paragraph 23.

22. The respondent's filing of pleadings and affidavits which contained statements he knew to be false or with reckless disregard for whether the statements made therein were true or false and his failure to call upon his client to correct false representations and to withdraw when those false statements were not rectified constituted violations of Mass. Rule Civ. P. 11 and Canon One, Disciplinary Rules 1-102 (A)(4), (5) and (6); Canon Seven, Disciplinary Rule 7-102(A)(5) and (7); and Canon Seven, Disciplinary Rule 7-102(B)(1), as set forth in paragraph 34.

23. The text of the Disciplinary Rules cited in the foregoing petition for discipline is as follows:

**CANON ONE**

**A LAWYER SHOULD ASSIST IN MAINTAINING THE INTEGRITY AND COMPETENCE OF THE LEGAL PROFESSION**

**DR 1-102 Misconduct.**

(A) A lawyer shall not:

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(5) Engage in conduct that is prejudicial to the administration of justice.

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

## CANON SIX
## A LAWYER SHOULD REPRESENT A CLIENT COMPETENTLY

**DR 6-101 Failing to Act Competently.**

(A) A lawyer shall not:

(3) Neglect a legal matter entrusted to him.

## CANNON SEVEN
## A LAWYER SHOULD REPRESENT A CLIENT ZEALOUSLY WITHIN THE BOUNDS OF THE LAW

**DR 7-101 Representing a Client Zealously.**

(A) A lawyer shall not intentionally:

(1) Fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules, except as provided by DR 7-101(B). A lawyer does not violate this Disciplinary Rue, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.

(2) Fail to carry out a contract of employment entered into with a client for professional services, but he may withdraw as permitted under DR 2-110, DR 5-102 and DR 5-105.

(3) Prejudice or damage his client during the course of the professional relationship, except as required under DR 7-102(B).

**DR 7-102 Representing a Client Within the Bounds of the**

**Law.**

(A) In his representation of a client, a lawyer shall not:

(2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.

(5) Knowingly make a false statement of law or fact.

(7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

(B) A lawyer who received information clearly establishing that:

(1) His client has, in the course of representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication.

WHEREFORE, the Bar Counsel request that the Board of Bar Overseers:

1. Consider and hear the matter set forth herein.
2. Determine that formal discipline of the said Louis Kerlinsky, Esquire, is required.
3. File an Information concerning these matters with the Supreme Judicial Court.

Arnold R. Rosenfeld /s/
Bar Counsel

By Nancy E. Kaufman /s/
First Assistant Bar Counsel

Dated this 23rd day
of May, 1994.

Honorable Chief Justice Wilkins
Supreme Judicial Court
1412 Court House
Boston, MA 02108

In re: Louis Kerlinsky, S.J.C.-7626

Dear Sir:

Respondent respectfully petitions for rehearing as the decision

I. neglects to decide the issues in this case expressly and clearly,

II. unfairly misstates the crucial evidence and findings of the hearing committee and panel,

III. adopts and applies erroneous conclusions of law, some of which clearly violate due process rights,

IV. will undermine the administration of and deny access to justice by terrifying lawyers, and

V. imposes clearly unwarranted and disparate punishment.

"The administration of the judicial department should not be a mystery. What it does, why it does, what it does....should be an open book....to increase the public's trust and confidence in the judiciary....and address the public concerns and misunderstandings about what courts do....We have an excellent system for furnishing legal services to indigent....need attention....posting....of issues in cases pending in the S.J.C.." (Chief Justice Wilkins, 27 M.L.W. 1039) The legacy of the S.J.C. and its justices is their decisions. These should not be mysteries which undermine trust in the judiciary, discourage lawyers from

representing not only indigents but all clients except those with million dollar cases or millions for fees. A bar discipline system which can punish on the basis of ex post facto unconstitutional rulings enforced by the S.J.C. will destroy the bar and the legal system. Lawyers who are subject to arbitrary and capricious punishment and lawlessness, violations of the rule of law, will leave here to the detriment of everyone.

The decision here does not state the issues in this case, its statement of the facts is less than half true, it states the case in an untrue and therefore false light, and decides the case in an unprecedented, mysterious way by ex post facto rulings unclearly stated.

A young, near indigent girl was injured by a GM defectively designed, unsafe car and retained an attorney who would take her case to court on a contingent fee basis. Not only was this victim denied justice by the S.J.C. based on its newly created technicalities, but her lawyer was punished and defamed, in a decision which unfairly omits the crucial facts, for prosecuting her case and appealing it to the S.J.C..

The hearing committee (h.c.) found: "the evidence is insufficient to support a finding that there was fraud and deceit." A.79. "The word 'fraud'....connotes some form of intentional wrongdoing." National Academy of Science v. Cambridge Trust Co., 3 Mass. App. 314, 317 (1975). It found that Respondent had no intent to defraud or deceive. "He did not believe the defendants would take the false information at face value and rely to their detriment upon it." A.79. H.C. found he did not violate 1-102 (A)(4), "engage in conduct involving dishonesty, fraud, deceit (5) conduct,....prejudicial to the administration of justice." A.79. It found no "intentional wrongdoing" and thereby found there was no knowing wrongdoing. It and the panel also expressly found that he did not violate 7-102(5), did not "knowingly make a false statement of law or fact."

The decision erroneously states the "committee....findings contained support for the panel's conclusions....that respondent (1) prepared and served....material respondent knew to be false, (2) fraudulently procured affidavits, (3) permitted deposition testimony to stand uncorrected when he knew it contained false statements, and (4) engaged in conduct that....wasted....resources of the courts."

1. The decision states, "In interrogatories (sic) and an affidavit prepared by the respondent he falsely represented that expert witnesses were available to testify in support of Kourouvacilis' claim....and knew that none would testify in support of any of his client's claims." P.9. This is the only reference in the decision to "material respondent knew to be false." In fact, he "knew" and believed that they would testify in support of her claims based on their written statements. As an experienced lawyer who had litigated at least three other cases with GM, he knew GM would depose each identified witness. He would not identify anyone who would not support client's case.

Mathison's report of June 28, 1988, "c", states, "I feel that the car fire/explosion was the ultimate trigger for a severe, delayed emotional reaction." Her deposition, E.25, states "the final thing that kind of blew her out of the water was the explosion/fire in that car." She never stated she could not provide "the nexus between the fire and....emotional problem because, she was not qualified to identify the cause of the post-traumatic stress syndrome." She testified only that she was not qualified to state its physiology.

Grez's report of April 13, 1989 states, "Based on my experience and training and the above facts, it is my opinion that her under-the-hood fire of October 31, 1985 was due to defective wiring.....installed by GM." He also swore to this statement after the word "probably" was added even after his deposition and telephone statements that he did not know anything about the

(Chevrolet) or what could cause the fire." He knows what "knows" means. He clearly and honestly had an opinion based on provable hypothetical fact. He also told client "the car blew up due to a fault in the wiring from the manufacture of the car....and he would go to court." A.44. Mathison wrote "thank you for the opportunity to stand as advocate for a fine young woman." (E). Both were amply qualified by their training and experience to give expert testimony. Exh. 86, p.4,(e).

Lt. Colburn's official report stated the "most probable cause" of the fire, "short circuit, electrical wire." (a)

Treatises state, the "congested mass of wiring....literally a fire waiting to happen." "An electrical fire should not occur in the normal electrical system of a vehicle that is protected by safety devices." E.23.

Dr. Metz had written she had "post traumatic migraine" (l) and testified at his deposition "once they have it....if they get upset, they have more headaches." His testimony that he had no contact with client since January 1985 was clearly erroneous as he also performed an EEG in February 1985 and then continued her medication thereafter, although he had no record thereof. g-j.

There is no finding by the committee that client's statements were knowingly, intentionally false or fraudulent. It did find that she had a poor memory and post traumatic stress disorder, as the decision notes. P.7,8.

The above documentary evidence is uncontradicted and must be accepted as true. N.E., Malden Barrel Co. v. Binder, 341 Mass. 710, 713 (1961), Akers Motor Lines, Inc. v. State Tax Com'n, 344 Mass. 359 (1962). There is no sound basis or evidence to support a finding that respondent knew that expert witnesses were not available to support client's claims.

2. Nor is there any finding of fact by the h.c. or panel

or any evidence that respondent "fraudulently procured affidavits." This is a malicious gratuitous smear by the panel. The petition does not charge fraudulently procuring affidavits. It is an violation of due process to punish without giving prior notice of an alleged violation. In re Ruffalo, 390 U.S. 544, 555 (1968). That Grez was a front-end specialist who was not then engaged in doing wiring was not required to be stated in his affidavit. Basic fairness requires that the decision state that there was no evidence or finding or conclusion by h.c. that there were "fraudulently procured" evidence or state what that evidence is. No one should be so unfairly defamed.

3. There is no finding by the h.c. that respondent had "actual knowledge" that deposition testimony contained false statement and "he permitted deposition testimony to stand uncorrected." H.c. found "the Respondent filed discovery materials containing false information and failed to correct statements of his client which he knew or should have known to be false." A.78. This falls short of a finding of "actual knowledge" and there is insufficient evidence to establish "actual knowledge." The decision states none.

Client never said her car "required only maintenance." P.7. That Dr. Metz's records were evidently incomplete and failed to show any treatment of client after February 1985 did not warrant a finding that respondent knew his client's dates of treatment and that her statements were false. Nor is there any evidence that he knew of the dates of her employment. Actual knowledge is required by the Code but the decision does not say so. There is no evidence respondent had "actual knowledge" of any misstatements regarding client's employment or dates of visits to her doctor or the condition of her car.

To "know" means being aware of. Restatement of Agency (2nd), §9, com.c. There was no evidence that respondent was aware of any inconsistencies in her interrogatory answers. Nor did she ever claim she was unable to find work until June

1986. A.69.

The decision does not state what standard of proof is required to establish "knowledge." Nor did any rule or law give notice of when the time to correct inconsistencies expires. Nor has the decision now established this time. Respondent had ample time left to try to correct inconsistencies when the GM case ended by summary judgment.

Nor does "permitting" a client's false statements to stand uncorrected constitute a violation of Canon One, or conduct involving dishonesty, fraud or deceit, all of which require intent to deceive on the part of the lawyer. There is no intent to deceive established when a client misstates a fact due to poor memory or inadvertence and the lawyer does not immediately correct it, especially when the lawyer believes his opponent will not be deceived, as h.c. found here. The law does not require "a useless act."

Nor is there any prior law which required respondent to correct statements of his client which he knew were false, and the decision cites none. In 1989, the Mass. Bar Assoc. Committee on Professional Ethics wrote, #89-1; "In our view the intimations from the S.J.C. have been so ambiguous, the controversy over the proper interpretation of the rules has been so great....that no lawyer should be disciplined for adopting any of these positions" (including discretionary disclosure). Punishment on the basis of new interpretations of the Rules violates due process. Gentile v. State Bar of Nev., 501 U.S. 1030, 1049 (1991).

The decision also errs by concluding that the "panel rightfully corrected errors it concluded the hearing committee had made in applying its findings." P.11. Even if there were errors made by h.c., it expressly found no violation of Canon One, that there was no fraud or deceit, no wrongful intent, and no conduct involving dishonesty, fraud or deceit in the respondent's conduct. Even if there were inconsistencies in h.c. findings, the panel

cannot lawfully choose which set of inconsistent facts is true. The panel violated due process by making findings of fact without hearing any evidence, and the decision violates due process by affirming. Wolff v. McDonnell, 418 U.S. 539 (1974), Goldberg v. Kelly, 397 U.S. 254, 269 (1970). Neither h.c. nor the panel heard any testimony from the client.

4. Nor did respondent "waste the resources of the courts "by the GM case which the S.J.C. ended by a new interpretation of Rule 56 and which has been cited hundreds of times.

A. The evidence and findings do not warrant the conclusion that respondent violated 6-101 by neglect of any legal matter entrusted to him. The decision adopts an erroneous definition of neglect unclearly equating it, with negligence rather than indifference. A lawyer who is negligent is not per se unethical. Unethical conduct involves a higher degree of culpability.

Nevertheless, respondent was not negligent in failing to have the car "inspected by an expert" or to "investigate the cause of the fire....and client's claims of personal injury." Client agreed to have the car so inspected, do to the investigation needed, and obtain the experts, A.44, Exh. 137, and the h.c. so found. A.56, 72. Negligence involves a breach of duty and the duty here was established by the agreement of the parties. There was no client complaint and she was satisfied with respondent's handling of her case. A.47. Nor would expenditure for an expert have been warranted where client's injuries at the time her case was accepted did not appear substantial, the car had been inspected at the scene by the "fire marshall" who stated the fire was due to defective wiring installed in the factory, P.8, by an insurance appraiser who took photos and noted the burned wiring harness, GM would inspect the car and be subject to discovery of its findings, and client had no funds for experts. The defect was in the design and in many cars so that inspection of client's car was

not needed. Treatises admissible in evidence established the defect, and client obtained the necessary qualified experts, with their supporting expert opinions, who agreed to testify for her regarding liability and injuries. Respondent did not need an expert to establish an injury as client's own testimony and G.L. of Mass. C.93A was sufficient. He reasonably believed no expert was needed to establish liability under the res ipsa loquitur and Greco doctrines. He researched the law and treatises and reasonably believed on the basis of Mass. and other law that these doctrines were applicable and that the S.J.C. should permit a jury to find without the aid of expert testimony that an electrical fire in a six year old car should not occur while it was being driven if it was "protected by safety devices."

Respondent had sufficient evidence of liability and damages as the S.J.C. ruled in Kourouvacilis v. GM that his appeal was not frivolous and he lacked only an unprecedented jurat on Grez's signed statement.

Moreover, the panel found, "The facts did not support the claim to begin with regardless of prompt and adequate preparation," A.123, and h.c. and bar counsel found the case was "worthless" because there was allegedly no evidence of damages. The decision unfairly omits these findings. The S.J.C. is affirming a new rule in violation of due process, a lawyer should be punished for neglecting a worthless case, for failing to search for non-existent evidence.

The decision's statement that "Between November 1985 and April 1988, the respondent's investigation consisted of two letters to GM," P.7, n.5, is untrue. H.c. found, "On November 27, 1985, the Respondent wrote U.S.F&G....and received the appraisal, photographs and response on December 17, 1985." A.52.

B. Nor does the evidence warrant a finding of a violation of 7-101(A). Representing....zealously, "A lawyer shall

not intentionally....damage his client." There was no evidence of such intent. The finding was the opposite. H.c. and panel expressly found no such intent, no such purpose. "The committee finds the respondent did not have (that) purpose." A. 102. The panel ruled, "The purpose of....respondent is irrelevant." A.116. The decision acknowledges that the finding was "the respondent's conduct, and therefore his violation of 7-101(A1 (1),(2), (3) was intentional." That the conduct was intentional does not establish that there was an intent to damage. The S.J.C. has clearly erred. This new interpretation of the Rule violates due process. Gentile, supra, as it imposes punishment without notice. This new interpretation, that a lawyer acts unethically by harming an alleged frivolous, worthless case is irrational, mysterious and unexplained.

C. There was no evidence to support the panel's and h.c.'s finding that respondent violated 7-102(A)(2), "knowingly advanced an unwarranted claim," solely because there was no evidence of damages. There was evidence of damages, a burned hand, smoke inhalation, a severe, delayed emotional reaction, all of which client swore to in her interrogatory answers and deposition. Her testimony is evidence regardless of whether h.c. found it was true. C.93A also provides damages for breach of warranty without evidence of damages. There was clearly evidence to support damages and the panel so acknowledged. A.122,123. Respondent did not prosecute a "frivolous claim" P.13, (see M.R.P.C.(3), com. 2), although the decision so rules mysteriously and without any explanation. Allowance of a motion for summary judgment or even losing a case does not establish "an unwarranted claim." The S.J.C. expressly ruled in the GM case that there was no frivolous appeal and implicitly ruled that the case was not frivolous.

D. H.c.'s findings establish that "client did not clearly perpetrate a fraud" in violation of 7-102(B)(1) because it clearly found that no fraud was perpetrated. "The defendants did not believe the information and did not rely on it." A.79.

Notwithstanding the decision's statement to the contrary, P.10, there was no evidence a fraud was perpetrated.

E. There was insufficient evidence and findings to support a conclusion that respondent violated 7-102(A)(7), assisted "his client in conduct that he knew to be....fraudulent." There were no fraudulent statements by client regarding her car, employment, visits to Dr. Metz or her experts. Even if there were inconsistencies and contradictions of her statements, the evidence and findings are insufficient to warrant a finding that she made them with intent to deceive rather than due to mistake, inadvertence or poor memory. Even if the evidence and findings are sufficient to establish client's state of mind and intent, they are insufficient to establish that respondent had "actual knowledge" thereof. Even if he did, the evidence is insufficient to establish that he assisted her in making or "advancing" these statements. Assistance requires that respondent share his client's fraudulent intent, and h.c., the sole finder of fact, expressly found he did not have intent to defraud or deceive.

Having "reviewed the entire record and....satisfied that there was more than adequate evidence to support each of the violations," P.10, the S.J.C. could readily state in its decision any evidence or even findings which "support each violation." It states no such evidence. The S.J.C. decision not only besmirches an old lawyer's reputation and defames him, but will instruct all lawyers, BBO, BC in how to practice law and what should and should not be done to pursue justice for non-rich clients in order to escape the Bar Counsel, independent counsel, and the BBO, the grand jury-like volunteers to punish the weak. The public and bar expect the Courts to state the crucial facts, issues and arguments of each case it reports and to state clearly its rulings on the issues, explaining its decisions.

The decision's following statements and their innuendos are untrue or only half true (and therefore false)."

1. "Respondent failed to adequately investigate the cause of the fire." 2. "Between November 1985 and April 1988, the respondent's investigation consisted of two letters to GM." 3. "Neither did respondent investigate his client's claims of personal injury." 4. "Mathison stated that she only had an "impression" of the effect of the fire." 5. "Mathison stated [client] had reported no physical injury." 6. "Mathison could not provide the nexus between the 1985 fire and the emotional problems." 7. "She was not retained as an expert." 8. "Respondent....alleging that Dr. Metz treated her." 9. "Respondent did not counsel her to correct her misstatements." 10. "Respondent....removed the qualification about [Grez's] experience." 11. "In interrogatories and an affidavit prepared by the respondent he falsely represented that expert witnesses were available." 12. "He had neither consulted nor retained any of them as expert witnesses." 13. Dr. Metz would not "testify in support of any of his client's claims." 14. "He also attempted to file an unsworn statement of Grez." 15. "Respondent also advanced misstatements about employment and alleged wages lost." 16. "Kourouvacilis claimed...she....had been unable to find work until June 1986." 17. "There was more than adequate evidence to support each of the violations." 18. "In June 1984....the complaint alleged that the automobile had been seriously damaged in the 1983 accident, that it was unsafe to drive and that as a result of the accident....was being treated...."

The above statements in the decision which are inconsistent with or contradicted by the record are respectfully advanced to illustrate that inconsistencies , contradictions and untrue ("false" in h.c.'s terminology) statements do not establish that they were knowingly or intentionally untrue or false, nor that a probable inference may be drawn that untrue statements were actually known to be fraudulent, knowingly, intentionally made to deceive. Here, no probable inference can be drawn that any inconsistencies or contradictions of client's statements establish that they were made knowingly and intentionally to deceive, or that respondent had actual knowledge of her intent, state of mind.

There is no basis for the decisions's conclusion that "the respondent neglected his client's case. He prosecuted a frivolous claim. He filed false and misleading affidavits and interrogatory answers." P.13. There is "reason to provide point by point rebuttal to the respondent's arguments." P.10.

H.c. never found that client's statements were made by her with intent to deceive or were fraudulent; that respondent had actual knowledge that any statement made by client was untrue or that respondent's conduct was fraudulent or deceitful. H.c's finding regarding violations of 7-102(A)(7) and (B)(1) are based on only three alleged statements made by client; (1) her car "did not operate well, (2) "she lost work because of the 1985 fire," (3) "Dr. Metz stated he had not treated [her] since February 1985." Respondent had no "actual knowledge" of any of this even if any of this was untrue or material. Respondent testified he was not aware of any fraudulent conduct by his client. H.c. made a credibility determination that respondent's testimony was truthful and he did not intend to deceive, that there was no "fraud or deceit" by respondent. The decision errs in concluding "The hearing committee's....findings...support....the conclusion that this behavior constituted 'fraudulent, dishonest conduct,'" P.12, and in failing to explain its conclusions.

The key issue is what is the standard of proof to apply in determining a lawyer's knowledge. H.c., the panel and decision imply that the lawyer must judge his client's credibility and if B.C. and BBO believe the lawyer should conclude that his client's statement is untrue, this established that the lawyer knew his client's statement was false. This is contrary to existing law holding that a lawyer should not prejudge nor determine his client's credibility. Com. v. Sullivan, 410 Mass. 521, 527 (1991), U.S. v. Holladay, 566 F2d 1018, 1019 (5th Cir., 1978), Restatement of Torts, (2nd), §674, com.d., In re Grievance Comm'ee of U.S. D. Ct. Of Conn., 847, F2d 57 (2nd Cir., 1988)

"It is the role of the judge or jury to determine the facts, not that of the attorney." U.S. ex rel Wilcox v. Johnson, 555 F2d 115, 122 (3rd Cir., 1977).

This decision will alter the practice of law here. 1. Lawyers will not represent a client where she may require an expert or other services where the client does not prepay for them (unless the likelihood of a huge recovery warrants advancement of costs) even where client agrees to obtain and pay for the expert and services, as here, and the lawyer is willing to proceed on a res ipsa theory or other basis where other services are not needed. 2. Lawyers will not do anything which may unintentionally cause harm to a client; including the giving of advise and litigation decisions, as a decision subjects him to punishment where intentional acts cause harm, even where their intent is not to cause harm. 3. Lawyers will not represent a client whose statements are contradicted as he may be punished for not judging her credibility and not deciding that her statements are false, particularly as this decision holds that a lawyer vouches for all of his client's statements. 5. Lawyers may not suggest to his client answers to a deposition question under Rule 30(c) and now will not represent a client who does not agree to "correct" an answer to interrogatories or at a deposition, as he will be punished for not correcting his client's testimony. 6. As a lawyer may be punished by ex post facto rules and new, unprecedented interpretations of rules of which he has no notice, it may be time to leave here. 7. As lawyers are punished for advancing a "claim or defense....supported by good faith arguments for an extension, modification, or reversal of existing law" no such arguments will be made, to the detriment of the law and the public. 9. No attorney will represent a client if he will be punished if his client is found to have made an untrue statement.

The decision that "Bar discipline charges need only be proven by a preponderance of the evidence," P.12, n.10, relies on

Matter of Mayberry, 295 Mass. 155, 167 (1936) and is unconstitutional and in violation of due process. Mayberry's reason for rejecting the "clear and convincing" standard is, "such terms are too vague to serve generally as a practical guide in the trial of cases." This 1936 case has been superseded in Mass. by such cases as Ryan v. Ryan, 419 Mass. 86 (1984), Guardianship of Roe, 383 Mass. 415 (1981), Rockdale Mgt. Co. v. Shawmut Bank, 418 Mass. 596 (1994) where the "clear and convincing" standard was used. In addition, this standard is now mandated by the U.S. Constitution's due process clause since 1982. Santosky v. Kramer, 455 U.S. 759 (1982).

Punishment based on new interpretations of rules and new ex post fact rules as aforesaid, violate respondent's due process rights. Gentile, supra. In re Ruffalo, 390 U.S. 544 (1968). See Sacher v. U.S., 343 U.S. 1, 13, 72 S.Ct. 451, 457 (1952) ("This Court, if its aid be needed, will unhesitatingly protect counsel in fearless, vigorous and effective performance of every duty pertaining to the office of the advocate on behalf of any person whatsoever.")

Respondent's prior discipline, 406 Mass. 67 (1989), was based on an unprecedented, unconstitutional, ex post facto interpretation of the Rules, which was contrary to practically every decision elsewhere. These held that a lawyer's fee agreement terminates after trial so that he was entitled to additional fees for an appeal. However, for the first time in Mass., the S.J.C. held that such law did not apply and, therefore, that respondent was not entitled to an additional fee for his services for an appeal, and, therefore, he had charged an excessive fee. The S.J.C. ruled without any Mass. precedent, that where there is a dispute over the interpretation of a client's fee contract and the lawyer loses, he has violated the rules if he charged a fee based on his interpretation of the contract regardless of his good faith and lack of wrongful intent. Lawyers

now dispute a fee at their peril. The "unethical behavior" in the respondent's earlier discipline case, as in this case, was the litigation of an issue of law on the basis of precedent. In the earlier case, the issue was whether the fee agreement terminated after trial (and that client orally agreed to pay extra for his appeal). In this client's case, the issue was whether the Greco and res ipsa loquitur doctrines were applicable to a car which should be protected from fires by safety devices; and whether Evangelio v. Metro. Bottling Co., 339 Mass. 177 (1959) holding should be modified. There was also no rule requiring correction of client's inconsistencies or mistaken statements short of several months before trial and until after summary judgment motions were decided. The S.J.C. erred in sanctioning respondent in 1989.

In Matter of Tobin, 417 Mass. 81 (1994) not only did the lawyer, "intentionally and fraudulently" induce his client to retain him for unnecessary services, but he also made false and fraudulent representations to the Probate Court and had a prior censure. The S.J.C. reduced his three year suspension to eighteen months. Here, respondent did not injure or intend to injure his client and made no false statements to anyone.

In Matter of Tobin, 417 Mass. 92 (1974), that lawyer received an 18 month suspension for attempting to collect excessive fees, failing to surrender his client's property to her, false statements to the Probate Court and vexatious litigation over a ten year period in nine cases with eighteen appeals.

Here, respondent has "not been convicted of crime....(nor) demonstrated a pattern of neglect and deceit or misused substantial sums of client's funds." P. 14. The decision errs in holding that "respondent's conduct in this case rises to the level of a 'pattern of neglect' warranting a three year suspension." P.14. The only neglect the decision mentions is failure "to investigate the cause of the fire, and failed to have the automobile

inspected by an expert....investigate his client's claim of personal injury." P. 7,8. However, as stated above, respondent adequately investigated the only case referred to, the GM case.

Matter of Dittami, 12 Mass. Atty. Discip. Rep. 98 (1996) is not "analogous." P. 14. In Dittami not only had "the attorney engaged in conflicts of interests....and made....misrepresentations ....previously had received a public censure....[and] suspension [of] three years," P.14,15, as the decision states, but he also failed to repay a loan, personally denied under oath the truth of statements he knew to be true" in a suit against him, and in his affidavit he personally "intended to mislead the court," P.111,112 and he borrowed "money from a client without obtaining....informed consent" P.112, and breached his promise to record a mortgage.

Here, however, respondent made no knowing false statements, did not intend to mislead anyone and did not breach any contract.

There was no "pattern of neglect or deceit" and the number of violations does not establish a "pattern." The decision states only one act of alleged negligence in 1985, "failed to have the automobile inspected by an expert," P.7.

The decision states only one act of alleged deceit: in 1989 "he falsely represented that expert witnesses were available to testify in support of Kourouvacilis claims," P.9.

The increase of punishment because of a lack of "appreciation that his behavior....violated the Canons" is akin to increasing punishment for failing to plead guilty and violates due process rights.

In Matter of Dawkins, 412 Mass. 90 (1992) the attorney deliberately misappropriated his client's funds, ignored judge's inquiries and did not pay his client's hospital bill as he had agreed to do. He also had a prior public censure

In Matter of Provanzano, 5 Mass. Atty. Disc. Rep. 300, there were "multiple instances of perjury" and prior discipline which "involved a deliberate misrepresentation made by the [attorney] to the Housing Court," P. 304. The court imposed a "public censure rather than suspension" because "the evidence does not reveal a pattern of longstanding or continuous wrongful conduct." There were no "'multiple instances' and a 'pattern' of perjury. In addition, the respondent is....general counsel for a corporation and does not have private clients. Because of the nature of his practice, the protection of the public which the sanction of suspension is designed to afford is rendered unnecessary.....the objective of a bar disciplinary proceeding in no small part is to determine what measure of discipline is necessary to protect the public from potential future misconduct"

Here, respondent is 72 years old, deaf, has closed his office and has no intention "to resume the private practice of law." Instead, he intends to study Holy Scripture, beginning with Psalm 82 which is recited every Tuesday all over the world, and to write about his experiences with courts and judges in 46 years of practice as a trial and appellate lawyer in Mass. So that "the administration of the judicial department should not be a mystery....and address the public's concerns....about what courts do."

Respectfully submitted,

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